

March 6, 2023

**By email and first-class mail**

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United States Environmental Protection Agency  
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Re: Complaint under Title VI of the Civil Rights Act of 1964 and the Environmental Protection Agency's implementing regulations regarding discrimination by the State of Alabama and the Alabama Department of Environmental Management in their administration of the Clean Water State Revolving Fund

Dear Acting Director Hoang,

The Center for Rural Enterprise and Environmental Justice and the Natural Resources Defense Council submit this complaint against the Alabama Department of Environmental Management (ADEM) and the State of Alabama for violating Title VI of the Civil Rights Act of 1964 and EPA's implementing regulations, 40 C.F.R. Part 7.

There is an urgent need to improve sanitation access for Alabama residents, especially Black residents. Soil conditions and a long history of discrimination have contributed to a public health crisis in the state: Many residents, disproportionately Black, lack adequate sanitation. This environmental inequity is most acute in Alabama's Black Belt, where many people lack access to a centralized sewage utility and must rely on expensive onsite sanitation systems, which often fail. Those who cannot afford a functioning onsite system are forced to resort to makeshift straight pipes that discharge raw sewage outdoors. This threatens people's health, degrades the local environment, undermines human dignity, and causes economic harm to individuals, families, and entire communities.

Money from Alabama's Clean Water State Revolving Fund could be used to help. The purpose of the State Revolving Fund is to provide communities and individuals with low-cost financing or grants for water quality projects, including projects relating to decentralized wastewater treatment and onsite sanitation. ADEM administers Alabama's Clean Water State Revolving Fund, and ADEM is now disbursing money appropriated under the Infrastructure Investment and Jobs Act through the State Revolving Fund too. But ADEM administers the Clean Water State Revolving Fund according to a set of policies that make it impossible for people who need help with onsite sanitation to access this money. These policies disproportionately harm Alabama's Black residents and perpetuate an unconscionable situation.

ADEM blocks the use of Clean Water State Revolving Fund money for onsite sanitation needs in six ways:

1. Under ADEM regulations, only public bodies can apply for and receive State Revolving Fund support. That rules out individuals, homeowners' associations, community groups, and nonprofit organizations that, under federal law, are otherwise eligible for State Revolving Fund money for onsite sanitation needs.
2. ADEM's project ranking system for State Revolving Fund applications effectively disqualifies people who rely on onsite systems. ADEM allocates an extremely low number of available points for onsite systems in its ranking system, relative to other projects and compared to other states. As a result, onsite sanitation projects are unable to earn enough points to secure any funding.
3. ADEM does not consider financial need in its project ranking system. That means people and communities with the greatest need—including people forced to rely on straight pipes to discharge sewage because they cannot afford a working onsite system—are not prioritized over others for State Revolving Fund support.
4. Federal law requires states to provide additional subsidies for some State Revolving Fund recipients in the form of grants or forgivable loans. For at least the past four years, ADEM has unreasonably limited the amount of additional subsidization it offers, denying available funding to people with financial need.
5. ADEM conducts inadequate outreach to disadvantaged communities regarding the availability of State Revolving Fund money for onsite sanitation. ADEM's inaction means many people in dire need of financial support never apply, because they are unaware of a significant existing resource that could help.
6. According to ADEM, it provides all State Revolving Fund assistance by purchasing bonds from the funding recipient. ADEM does not offer alternative financing options that are available in many other states. This impedes participation by individuals with onsite sanitation needs and organizations that serve them, who are not able to issue bonds.

The result is stark: Alabama has distributed more than one and a half billion dollars in Clean Water State Revolving Fund money since the program's inception in 1987, but it has never awarded any money through the State Revolving Fund to support onsite sanitation needs. This in a state where sanitation inequity has attracted international criticism.

Title VI of the Civil Rights Act prohibits entities that receive federal funding from engaging in activities that subject individuals to discrimination based on race. ADEM and the State of Alabama receive federal financial assistance from EPA and are bound by this prohibition against discrimination. We request that EPA's Office of External Civil Rights Compliance accept this complaint, investigate these allegations, and ensure that ADEM and the State of Alabama eliminate the racially discriminatory effects of their current practices.

## I. Parties

The complainants are Center for Rural Enterprise and Environmental Justice and the Natural Resources Defense Council. This complaint is filed on behalf of Black Alabama residents with onsite sanitation needs.

Center for Rural Enterprise and Environmental Justice (CREEJ) works to address the lack of wastewater infrastructure in rural communities across the United States. Through direct action and partnerships with institutional collaborators, CREEJ prioritizes policy influence, technology innovation, and health research while operating from a framework of human rights and environmental justice principles.

The Natural Resources Defense Council (NRDC) is an environmental and public health nonprofit advocacy organization. NRDC is committed to protecting communities from health threats and works to lessen the disproportionate burdens borne by communities of color and low-income communities from environmental contamination. One of NRDC's priorities is to help create strong, just, and resilient communities, including by improving access to safe and adequate sanitation systems.

The recipients are the Alabama Department of Environmental Management (ADEM) and the State of Alabama.

## II. Jurisdiction

EPA will accept a complaint for investigation under Title VI if the complaint: (1) is in writing; (2) alleges discriminatory acts that, if true, may violate EPA's Title VI regulations; (3) identifies a recipient of EPA assistance that committed the alleged discriminatory acts; and (4) is either filed within 180 days of the alleged discriminatory acts or asserts a continuing discriminatory policy or practice.<sup>1</sup>

This complaint meets each of these requirements. This written complaint is timely because it alleges ongoing discriminatory conduct and was filed within 180 days of ADEM's most recent Clean Water State Revolving Fund disbursements, announced on September 15, 2022,<sup>2</sup> which relied on the discriminatory criteria and policies outlined in this complaint. The complaint also alleges discriminatory policies that cause disparate harm to Black residents, in violation of EPA's regulations.<sup>3</sup> EPA's annual State Revolving Fund grants to ADEM constitute "assistance," and ADEM and the State of Alabama are both "recipients" under the law.<sup>4</sup>

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<sup>1</sup> 40 C.F.R. § 7.120(b); U.S. EPA, External Civil Rights Compliance Office, *Case Resolution Manual* 5, 7-8 (Jan. 2021), <https://bit.ly/3id3dyj> ("EPA, *Case Resolution Manual*").

<sup>2</sup> ADEM, *ADEM Approves \$348 Million for Water, Sewer Projects* (Sept. 15, 2022), <https://bit.ly/3CoaH8C>.

<sup>3</sup> 40 C.F.R. § 7.35(b).

<sup>4</sup> *See id.* § 7.25 (definitions of "EPA assistance" and "recipient").

Title VI applies to “any program or activity” that receives federal assistance.<sup>5</sup> “Program or activity” includes all of the operations of a state agency, “any part of which is extended Federal financial assistance.”<sup>6</sup> ADEM’s management of the Clean Water State Revolving Fund in Alabama is a program or activity, as is Alabama’s enactment of Clean Water State Revolving Fund implementing legislation (at Alabama Code sections 22-34-1 to 22-34-17).<sup>7</sup> ADEM and the State of Alabama are therefore subject to Title VI and EPA’s implementing regulations.

There are no prudential reasons for EPA to decline jurisdiction over this complaint.<sup>8</sup> The same allegations are not pending before EPA or any other agency. Nor to our knowledge is there any current EPA Title VI investigation into ADEM’s administration of the Clean Water State Revolving Fund.<sup>9</sup> In November 2021, the Department of Justice announced an investigation under Title VI into the onsite wastewater disposal and infectious disease and outbreaks programs of the Alabama Department of Public Health and the Lowndes County, Alabama, Health Department.<sup>10</sup> Although that investigation similarly concerns inadequate sanitation in Alabama, it is limited to disparate harm in one county and to the activities of other state and county agencies. It does not concern ADEM’s administration of the Clean Water State Revolving Fund.

### **III. Factual background**

#### **A. Inadequate sanitation plagues Alabama’s Black residents**

For decades, many Alabama residents have struggled to access adequate sanitation.<sup>11</sup> The problem is especially severe in the Black Belt, named for its dark, fertile, clayey soils.<sup>12</sup> In

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<sup>5</sup> 42 U.S.C. § 2000d; 40 C.F.R. § 7.30.

<sup>6</sup> 40 C.F.R. § 7.25.

<sup>7</sup> *Id.*; see also U.S. Department of Justice, Civil Rights Division, *Title VI Legal Manual* Section V at 26 (last modified Feb. 2021), <https://bit.ly/3ifHNkg> (“DOJ, *Title VI Legal Manual*”).

<sup>8</sup> See EPA, *Case Resolution Manual*, supra n.1, at 10-11.

<sup>9</sup> See U.S. EPA, *External Civil Rights Docket, 2014-Present*, <https://bit.ly/3jLVpE9> (last edited Feb. 28, 2023).

<sup>10</sup> U.S. Department of Justice, Office of Public Affairs, *Justice Department Announces Environmental Justice Investigation into Alabama Department of Public Health and Lowndes County Health Department* (Nov. 9, 2021), <https://bit.ly/3i7XmKU>.

<sup>11</sup> See, e.g., Catherine Coleman Flowers, *Waste: One Woman’s Fight Against America’s Dirty Secret* 4, 9-10, 14 (2020) (Flowers, “*Waste*”).

<sup>12</sup> Jiajie He et al., *Assessing the Status of Onsite Wastewater Treatment Systems in the Alabama Black Belt Soil Area*, 28 *Env’tl Engineering Sci.* 693, 694-95 (2011), <https://bit.ly/3Xv7kVC> (“He et al., *Assessing the Status of Onsite Wastewater Treatment Systems*”) (Ex. 1). This complaint uses the term Black Belt to refer to 17 Alabama counties: Barbour, Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery, Perry, Pike, Russell, Sumter, and Wilcox. See, e.g., Jessica Cook Wedgworth & Joe Brown, *Limited Access to Safe Drinking Water and Sanitation in Alabama’s Black Belt: A Cross-Sectional Case Study*, *Water Quality, Exposure & Health* 2 (June 2013), <https://bit.ly/3Xsze4r> (using 17-county definition) (“Wedgworth & Brown, *Limited Access to Safe Drinking Water and Sanitation*”) (Ex. 2).

rural areas, many people are not served by a centralized sewer system and must rely on onsite sewage treatment.<sup>13</sup> In the Black Belt, onsite systems often fail because of the region's impermeable soil,<sup>14</sup> and broken or failed onsite sanitation systems cause raw sewage to back up into homes or pool outside.<sup>15</sup> This problem will worsen as climate change intensifies, leading to rising water tables and more intense rains, which will increase failure rates for onsite sanitation systems.<sup>16</sup>

Black Belt counties are among the state's poorest.<sup>17</sup> The cost of an effective onsite sanitation system—up to tens of thousands of dollars<sup>18</sup>—is out of reach for many.<sup>19</sup> But homeowners in Alabama have the responsibility to install and maintain a state-permitted onsite sanitation system.<sup>20</sup> Those who cannot afford a functioning onsite system are forced to use makeshift straight pipes that discharge raw sewage from homes to yards, woods, or other nearby outdoor areas.<sup>21</sup> At the same time, state laws threaten residents who cannot afford

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<sup>13</sup> See Maxwell Izenberg et al., *Nocturnal Convenience: The Problem of Securing Universal Sanitation Access in Alabama's Black Belt*, 6 Env't'l Justice 200, 201 (Dec. 2013), <https://bit.ly/3QeRaNs> (“Izenberg et al., *Nocturnal Convenience*”) (Ex. 3).

<sup>14</sup> See *id.* at 201-02; Emily Meza, *Examining Wastewater Treatment Struggles in Lowndes County, AL* 5 (Apr. 27, 2018) (Master's thesis, Duke Univ.), <https://bit.ly/3i8xgHH> (“Meza, *Examining Wastewater Treatment Struggles*”) (Ex. 4).

<sup>15</sup> Bill Whitaker, *60 Minutes investigates: Americans fighting for access to sewage disposal*, CBS News (Dec. 19, 2021), <https://bit.ly/3ZdrHIE> (“Whitaker, *Americans fighting for access to sewage disposal*”); Sabrina Tavernise, *A Toilet, but No Proper Plumbing: A Reality in 500,000 U.S. Homes*, N.Y. Times (Sept. 26, 2016), <http://bit.ly/3GzdlJY> (“Tavernise, *A Toilet but No Proper Plumbing*”).

<sup>16</sup> E.g., Jim Morrison, *Backed-up pipes, stinky yards: Climate change is wrecking septic tanks*, Wash. Post (Apr. 12, 2022), <https://bit.ly/3GFIaOe>; see also U.S. EPA, *What Climate Change Means for Alabama* (Aug. 2016), <https://bit.ly/3GIw8Us>.

<sup>17</sup> Izenberg et al., *Nocturnal Convenience*, supra n.13, at 201; Stephen G. Katsinas et al., *Poverty, Housing, & GDP in Alabama's Black Belt* 1-4 (Mar. 2022) (Univ. of Ala. Issue Brief No. 58), <https://bit.ly/3X3Vu4z> (“Katsinas et al., *Poverty, Housing, & GDP in Alabama's Black Belt*”) (Ex. 5).

<sup>18</sup> Izenberg et al., *Nocturnal Convenience*, supra n.13, at 202; see also, e.g., Patricia A. Jones & Amber Moulton, *The Invisible Crisis: Water Unaffordability in the United States* 14 (May 2016), <https://bit.ly/3GIjsgw>.

<sup>19</sup> E.g., Flowers, *Waste*, supra n.11, at 10; Inga T. Winkler & Catherine Coleman Flowers, “*America's Dirty Secret*”: *The Human Right to Sanitation in Alabama's Black Belt*, 49 Colum. Human Rights L. Rev. 181, 188-89 (2017) (“Winkler & Flowers, *America's Dirty Secret*”); U.N. General Assembly, Human Rights Council, *Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque* ¶ 22 (Aug. 2, 2011), <https://bit.ly/3jMfgTL> (“U.N. General Assembly, *Report of the Special Rapporteur*”); see generally U.S. EPA, *Financing Decentralized Wastewater Treatment Systems: Pathways to Success with the Clean Water State Revolving Fund Program* 3 (Jan. 2022), <https://bit.ly/3X4LHen> (“[P]rojects to address decentralized systems can be prohibitively expensive for many homeowners, thus delaying important investments in the wastewater infrastructure needed to protect public health and water quality.”) (“EPA, *Financing Decentralized Wastewater Treatment Systems*”).

<sup>20</sup> Ala. Code § 22-26-2; Ala. Admin. Code §§ 420-3-1-.02, .04(101), .05.

<sup>21</sup> E.g., Ala. Section of the American Society of Civil Engineers, *2022 Report Card for Alabama's Infrastructure* 106, <https://bit.ly/3WNCdL8>; Tavernise, *A Toilet, but No Proper Plumbing*, supra n.15; Michael Regan, U.S. EPA, Twitter (Aug. 2, 2022, 6:07 PM) (@EPAMichaelRegan), <https://bit.ly/3X8Zpx8>.

functioning onsite systems with fines, arrests, and potential liens on their homes.<sup>22</sup> Sanitation inequity in Alabama has become notorious, raising human rights concerns and garnering national and international attention.<sup>23</sup>

There is incomplete information on the number of failing onsite systems and the use of straight pipes in Alabama. The U.S. Census has not collected data on sanitation since 1990,<sup>24</sup> and Alabama has not attempted any statewide survey or analysis.<sup>25</sup> But existing information paints a picture of rampant, predictable onsite system failure and pervasive straight pipe use throughout the Black Belt. One study estimated that almost 90 percent of land in the Black Belt is not suited for conventional onsite sanitation.<sup>26</sup> A survey in Wilcox County found that more than 90 percent of unsewered homes had an unpermitted sewage system, 60 percent with a visible straight pipe and 33 percent with a buried straight pipe or other unpermitted system.<sup>27</sup> A concurrent survey in Hale County found that 65 percent of unsewered homes lacked permitted onsite systems, and six percent had visible straight pipes.<sup>28</sup> Another study reported that 18 percent of households in one surveyed Black Belt county lack access to any wastewater treatment.<sup>29</sup> And in Lowndes County, 15 percent of survey respondents reported that they had a failing onsite sanitation system or no wastewater treatment at all.<sup>30</sup> The Alabama Department of Public Health thinks the number is much higher: it has estimated that 40 to 90 percent of all Lowndes County households have inadequate or no onsite sanitation.<sup>31</sup>

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<sup>22</sup> Ala. Code §§ 22-26-1, 22-26-6, 45-43-171; Flowers, *Waste*, supra n.11, at 14; Ala. Ctr. for Rural Enter. et al., *Flushed and Forgotten: Sanitation and Wastewater in Rural Communities in the United States* 28-29 & nn. 253-261 (May 2019), <http://bit.ly/3IMswSN> (“ACRE, *Flushed and Forgotten*”).

<sup>23</sup> E.g., U.N. General Assembly, *Report of the Special Rapporteur*, supra n.19, at ¶¶ 19-23, 89; Winkler & Flowers, *America’s Dirty Secret*, supra n.19, at 209-20; U.N. Human Rights, Office of the High Comm’r, *Statement on Visit to the USA*, by Professor Philip Alston, *United Nations Special Rapporteur on extreme poverty and human rights* ¶¶ 7, 37 (Dec. 15, 2017), <https://bit.ly/3Gf3qch> (“U.N. Human Rights, *Statement on Visit to the USA*”); Whitaker, *Americans fighting for access to sewage disposal*, supra n.15; Tavernise, *A Toilet, but No Proper Plumbing*, supra n.15.

<sup>24</sup> U.S. Census Bureau, *Historical Census of Housing Tables: Plumbing*, <https://bit.ly/3VR9r4K>; U.S. EPA, Office of Water, *Report to Congress on the Prevalence throughout the U.S. of Low- and Moderate-Income Households without Access to a Treatment Works and the Use by States of Assistance under Section 603(c)(12) of the Federal Water Pollution Control Act* 4 (July 2021), <https://bit.ly/3Zp7u2H> (“EPA, *Access to a Treatment Works*”).

<sup>25</sup> U.N. Human Rights, *Statement on Visit to the USA*, supra n.23, at ¶ 44.

<sup>26</sup> He et al., *Assessing the Status of Onsite Wastewater Treatment Systems*, supra n.12, at 695.

<sup>27</sup> EPA Webinar, *Surface Discharge of Raw Wastewater Among Unsewered Homes in Central Alabama* 31 (March 28, 2017), <https://bit.ly/3ZbiRel> (“EPA, *Surface Discharge of Raw Wastewater*”) (Ex. 6); Ala. Water Res. Research Inst., *Annual Technical Report, FY 2016* 25, <https://bit.ly/3WOnQjm> (Ex. 7).

<sup>28</sup> EPA, *Surface Discharge of Raw Wastewater*, supra n.27, at 36.

<sup>29</sup> Wedgworth & Brown, *Limited Access to Safe Drinking Water and Sanitation*, supra n.12, at 4.

<sup>30</sup> Meza, *Examining Wastewater Treatment Struggles*, supra n.14, at 30. Given the threat of fines and criminal sanctions, these self-reported responses likely underrepresent true conditions. *Id.* at ii, 31.

<sup>31</sup> See U.N. General Assembly, *Report of the Special Rapporteur*, supra n.19, at 6 ¶ 20.

Sanitation access in Alabama is linked with race. Census data from 1990 (the most recent available on sanitation) shows that 3.9 percent of Black households in Alabama lacked complete plumbing, compared to 0.7 percent of White households.<sup>32</sup> In rural areas, 11.1 percent of Black households lacked complete plumbing, compared to 1.2 percent of White households.<sup>33</sup> Nationwide, “[i]nadequate and failing sanitation systems disproportionately impact rural areas and communities of color,”<sup>34</sup> and race is the strongest predictor of a lack of adequate water and sanitation access.<sup>35</sup> According to a recent report, Black and Latino households nationally are twice as likely as white households to lack complete plumbing.<sup>36</sup> EPA has recognized that the harms from inadequate onsite sanitation “disproportionately affect rural, minority, and economically disadvantaged communities that struggle to address these impacts given their limited financial capacity.”<sup>37</sup> The link between race, poverty, and sanitation inequity in the Black Belt is a product of centuries of racism and discrimination that can be traced directly to slavery, sharecropping, and enforced racial segregation.<sup>38</sup>

## **B. Inadequate onsite sanitation causes severe harms in Alabama**

Exposure to raw sewage from failing systems and straight pipes increases the risk of gastrointestinal illnesses, tropical diseases, antimicrobial resistance, anemia, miscarriages, and preterm births.<sup>39</sup> Untreated or inadequately treated sewage can also contaminate the groundwater used for drinking water wells, creating an elevated risk of waterborne disease.<sup>40</sup>

Sewage discharges from straight pipes and failing onsite systems also pollute streams and rivers and cause water quality impairment.<sup>41</sup> And inadequate sanitation causes community-

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<sup>32</sup> ACRE, *Flushed and Forgotten*, supra n.22, at 17. Complete plumbing in the 1990 Census was defined to mean hot and cold piped water, a bathtub or shower, and a flush toilet. U.S. Census Bureau, *Historical Census of Housing Tables: Plumbing*, <https://bit.ly/3VR9r4K>.

<sup>33</sup> ACRE, *Flushed and Forgotten*, supra n.22, at 17.

<sup>34</sup> *Id.* at 18.

<sup>35</sup> George McGraw & Radhika Fox, *Closing the Water Access Gap in the United States* 22 (2019), <https://bit.ly/3IMhZXB>.

<sup>36</sup> George McGraw, *Draining: The Economic Impact of America’s Hidden Water Crisis* 11 (2022), <https://bit.ly/3vXtiVD> (“McGraw, *Draining*”).

<sup>37</sup> EPA, *Financing Decentralized Wastewater Treatment Systems*, supra n.19, at 4.

<sup>38</sup> *E.g.*, Jennifer S. Carrera & Catherine Coleman Flowers, *Sanitation Inequity and the Cumulative Effects of Racism in Colorblind Public Health Policies*, Am. J. of Economics & Sociology (Oct. 29, 2018), <https://bit.ly/3XXOIUk> (Ex. 8); ACRE, *Flushed and Forgotten*, supra n.22, at 25; Katsinas et al., *Poverty, Housing, & GDP in Alabama’s Black Belt*, supra n.17, at 1, 9.

<sup>39</sup> *E.g.*, McGraw, *Draining*, supra n.36, at 36; Global Communities, *Closing the U.S. Sanitation Equity Gap: Exploring Opportunities to Learn from the Global Sanitation Sector Experience* 3 (Sept. 2021), <https://bit.ly/3if9Kso>; ACRE, *Flushed and Forgotten*, supra n.22, at 6; Megan L. McKenna et al., *Human Intestinal Parasite Burden and Poor Sanitation in Rural Alabama*, Am. J. of Tropical Medicine & Hygiene (Sept. 2017), <https://bit.ly/3X7sFnS> (Ex. 9).

<sup>40</sup> U.S. EPA, *Septic System Impacts on Water Sources*, <http://bit.ly/3GJ2JbH>.

<sup>41</sup> EPA, *Financing Decentralized Wastewater Treatment Systems*, supra n.19, at 4.

wide economic harm: “You can’t really attract any kind of businesses into a community if you don’t have adequate wastewater treatment.”<sup>42</sup>

Finally, inadequate onsite sanitation degrades people’s quality of life and takes a toll on mental health.<sup>43</sup> The smell from sewage on the ground can be a near-constant nuisance.<sup>44</sup> Some residents dread the sound of rainfall, because it means a likely sewage backup in their homes.<sup>45</sup> Other residents bar their children from playing in their yards because of the risk of exposure to human waste.<sup>46</sup> These conditions undermine human dignity and cause profound psychological harm.<sup>47</sup> Entire communities have endured this injustice for decades.<sup>48</sup>

#### **IV. Legal framework**

##### **A. The Clean Water State Revolving Fund**

The Clean Water State Revolving Fund is a financial assistance program for wastewater infrastructure and water quality projects.<sup>49</sup> Through the State Revolving Fund, EPA provides capitalization grants to states for further distribution to recipients within each state. States can use the funds to provide financial assistance for “the construction, repair, or replacement of decentralized wastewater treatment systems that treat municipal wastewater or domestic sewage.”<sup>50</sup> States can also use the funds to support a qualified nonprofit entity to assist “an eligible individual” for “the repair or replacement of existing individual household decentralized wastewater treatment systems” or “in a case in which an eligible individual resides in a household that could be cost-effectively connected to an available publicly owned treatment works, for the connection of the applicable household to such treatment works.”<sup>51</sup> An “eligible individual” under this subsection means a member of a low-income household, as defined in the Clean Water Act.<sup>52</sup> Additional uses of State

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<sup>42</sup> Alexis Okeowo, *The Heavy Toll of the Black Belt’s Wastewater Crisis*, New Yorker (Nov. 30, 2020), <http://bit.ly/3w2nslz> (quoting Catherine Coleman Flowers).

<sup>43</sup> ACRE, *Flushed and Forgotten*, supra n.22, at 6.

<sup>44</sup> *Id.* at 30; Winkler & Flowers, *America’s Dirty Secret*, supra n.19, at 189.

<sup>45</sup> ACRE, *Flushed and Forgotten*, supra n.22, at 30.

<sup>46</sup> Yamiche Alcindor, *In rural Alabama, raw sewage spurs investigation into racial inequality*, NBC News (April 22, 2022), <https://bit.ly/3jWiZ0U>.

<sup>47</sup> Glenn Thrush, *An Alabama Town’s Sewage Woes Test Biden’s Infrastructure Ambitions*, N.Y. Times (Jan. 12, 2022), <https://bit.ly/3GSafSw>.

<sup>48</sup> ACRE, *Flushed and Forgotten*, supra n.22, at 19; cf. Administrator Michael Regan, *Remarks for Office of Environmental Justice and External Civil Rights Launch* (Sept. 24, 2022), <https://bit.ly/3jMg3UJ>.

<sup>49</sup> See 33 U.S.C. §§ 1381–1388.

<sup>50</sup> *Id.* § 1383(c)(4).

<sup>51</sup> *Id.* § 1383(c)(12).

<sup>52</sup> *Id.* § 1383(j).

Revolving Fund monies include financial assistance for construction of publicly owned treatment works, for measures to reduce or recapture stormwater, for efforts to promote water conservation and reduce demand for wastewater treatment, and for projects to reduce energy consumption at publicly owned treatment works, among other things.<sup>53</sup> The Clean Water State Revolving Fund program is the largest dedicated source of funding for wastewater infrastructure in the country,<sup>54</sup> and it has been “the foundation of water infrastructure investments” for decades.<sup>55</sup>

A state can use the Clean Water State Revolving Fund to provide various types of financial assistance, including to offer low-interest loans or to refinance, purchase, or guarantee local debt.<sup>56</sup> States can also employ alternative financing strategies— including sponsorship, pass-through loans, linked deposit loans, and sub-state revolving funds—to allow the distribution of money directly to individuals or nonprofits.<sup>57</sup> Each state must also provide a certain amount of assistance in the form of additional subsidies, including grants or forgiveness of principal, for qualifying projects. Projects eligible for additional subsidies include those that serve communities facing affordability challenges.<sup>58</sup>

Each state must prepare an annual plan identifying the intended uses of its Clean Water State Revolving Fund money, referred to as an Intended Use Plan.<sup>59</sup> The Intended Use Plan must describe, among other things, the state’s long- and short-term goals for its revolving fund, and it must explain the criteria the state will use for selecting projects to fund.<sup>60</sup> States generally satisfy the latter requirement by creating a point system to rank project proposals based on how well they meet certain objectives. An Intended Use Plan must be made available for public comment before it is submitted to EPA for review and approval each year.<sup>61</sup> Apart from certain minimum requirements, EPA affords states “a high degree of flexibility for operating their revolving funds.”<sup>62</sup>

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<sup>53</sup> *Id.* § 1383(c).

<sup>54</sup> Becky Hammer & Katy Hansen, *A Fairer Funding Stream, How Reforming the Clean Water State Revolving Fund Can Equitably Improve Water Infrastructure Across the Country* 6 (Oct. 2022), <https://bit.ly/3W1QCfv> (“Hammer & Hansen, *Fairer Funding*”).

<sup>55</sup> U.S. EPA, *Implementation of the Clean Water and Drinking Water State Revolving Fund Provisions of the Bipartisan Infrastructure Law* 1 (March 8, 2022), <https://bit.ly/3QhDEsC> (“EPA, *Implementation Memo*”).

<sup>56</sup> 33 U.S.C. § 1383(d).

<sup>57</sup> See EPA, *Financing Decentralized Wastewater Treatment Systems*, *supra* n.19, at 14-23.

<sup>58</sup> 33 U.S.C. §§ 1383(i)(1), (i)(2), (i)(3)(B).

<sup>59</sup> 40 C.F.R. § 35.3150(a).

<sup>60</sup> *Id.* § 35.3150(b).

<sup>61</sup> *Id.* § 35.3150(a).

<sup>62</sup> *Id.* § 35.3100(a).

Nationwide, Clean Water State Revolving Fund programs have been used successfully to help address decentralized wastewater treatment needs.<sup>63</sup> States “have been working with local stakeholders to provide valuable assistance for decentralized wastewater projects in small, rural, and economically disadvantaged communities nationwide for more than 30 years.”<sup>64</sup> That assistance includes over \$469 million in funding for decentralized wastewater treatment projects.<sup>65</sup> Clean Water Act amendments in the past decade broadened the types of decentralized sanitation projects that can receive financing.<sup>66</sup> More than half of states nationwide have now funded decentralized wastewater projects,<sup>67</sup> and 16 states currently have active decentralized wastewater programs.<sup>68</sup> States have the flexibility to direct loans to individual homeowners to help with onsite sanitation.<sup>69</sup>

In 2021, Congress enacted the Infrastructure Investment and Jobs Act, also known as the Bipartisan Infrastructure Law.<sup>70</sup> That law appropriated an additional \$11.7 billion for the Clean Water State Revolving Fund program nationwide, over a five-year period.<sup>71</sup> Of that amount, 49 percent must be distributed as additional subsidies in the form of principal forgiveness or grants.<sup>72</sup> This gives States “the power to open the door to disadvantaged communities who for too long have struggled to compete for financing from traditional [State Revolving Funds] and other loan programs.”<sup>73</sup>

## **B. Alabama’s State Revolving Fund**

Alabama established its own revolving fund to administer the federal program in 1987.<sup>74</sup> Projects eligible for financial assistance through the fund in Alabama include, among other

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<sup>63</sup> EPA, *Financing Decentralized Wastewater Treatment Systems*, supra n.19, at 2 (“Across the country,” State Revolving Fund programs “have developed successful decentralized system financing programs based on strong relationships with community leaders and stakeholders to target financial assistance to populations with the greatest need.”).

<sup>64</sup> *Id.* at 6 (“Nationally, the [Clean Water State Revolving Fund] provided more than \$3.4 billion in combined assistance, since the program’s inception, for various types of decentralized wastewater projects and septic-to-sewer conversions.”).

<sup>65</sup> EPA, *Access to a Treatment Works*, supra n.24, at 8.

<sup>66</sup> See EPA, *Financing Decentralized Wastewater Treatment Systems*, supra n.19, at 6; U.S. EPA, *Overview of Clean Water State Revolving Fund Eligibilities* 15 (May 2016), <https://bit.ly/3jT4rPD> (citing 33 U.S.C. §§ 1383(c)(2), (3), (4), & (7)).

<sup>67</sup> EPA, *Access to a Treatment Works*, supra n.24, at 8, 47.

<sup>68</sup> EPA, *Financing Decentralized Wastewater Treatment Systems*, supra n.19, at 13.

<sup>69</sup> *Id.* at 6-8.

<sup>70</sup> Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

<sup>71</sup> Pub. L. No. 117-58, 135 Stat. 429, 1399.

<sup>72</sup> *Id.*

<sup>73</sup> Letter from Michael S. Regan, Administrator, U.S. EPA, to State Governors 2 (Dec. 2, 2021), <https://bit.ly/3ZfYUTQ>.

<sup>74</sup> Ala. Code § 22-34-3.

things, “[c]onstruction, repair or replacement of decentralized wastewater systems that treat . . . domestic sewage,” or “[a]ny other use allowable by the United States Environmental Protection Agency and consistent with this Act.”<sup>75</sup>

Under ADEM regulations—unlike under federal law—only public bodies can apply for and receive State Revolving Fund assistance in Alabama.<sup>76</sup> And per ADEM policy, the state provides all State Revolving Fund support by purchasing bonds issued by the borrower,<sup>77</sup> although both federal and state law allow ADEM to finance projects in other ways.<sup>78</sup>

ADEM has created a ranking system and project priority list to evaluate applications for State Revolving Fund money.<sup>79</sup> As required by EPA regulations,<sup>80</sup> ADEM’s Intended Use Plans provide further details on its ranking system and the projects it intends to support each year. ADEM’s priority ranking system awards points in seven categories: (1) enforcement and compliance (up to 50 points); (2) water quality (up to 135 points); (3) water/energy efficiency (up to 65 points); (4) stormwater management (up to 50 points); (5) agricultural/non-point source pollution (up to 35 points); (6) sustainability (up to 90 points); and (7) growth (up to 50 points).<sup>81</sup> Applicants must submit a pre-application form that identifies the number of points claimed, out of 475 available, and in what categories.<sup>82</sup> Applicants must also attach a description of the proposed project, including its location, purpose, and estimated cost, along with maps, the name of the project engineer, an engineering report, and additional information.<sup>83</sup>

Based on the applications it receives, ADEM prepares a project priority list and publishes a draft Intended Use Plan.<sup>84</sup> After public comment and EPA review, ADEM publishes its final Intended Use Plan, which identifies the projects it will finance that year, how much

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<sup>75</sup> Ala. Admin. Code §§ 335-11-1-.03(1)(d), (n). The Alabama Department of Public Health and county health departments oversee permitting for the construction and installation of onsite sanitation systems. *Id.* §§ 420-3-1-.05, 420-3-1-.06. But ADEM has jurisdiction over the Clean Water State Revolving Fund in Alabama, *see* Ala. Code § 22-34-3(b), which includes the authority to disburse State Revolving Fund awards for onsite sanitation projects, *see* Ala. Admin. Code §§ 335-11-1-.03(1)(d), (n).

<sup>76</sup> Ala. Admin. Code §§ 335-11-1-.01(e), (t) (limiting definition of “applicant” and “recipient” to include only public bodies); *id.* § 335-11-1-.01(s) (defining “public body” to mean “any county, state agency, incorporated city or town, or their instrumentality created by or pursuant to state law and having jurisdiction over the disposal of sewage”); *id.* § 335-11-1-.02 (limiting eligible applicants to public entities); *id.* § 335-11-1-.09(10) (loans shall only be made to public entities that meet certain criteria).

<sup>77</sup> ADEM, *CWSRF Intended Use Plan, Fiscal Year 2022* 5, <https://bit.ly/3vCCFcT>.

<sup>78</sup> *See* 33 U.S.C. § 1383(d); Ala. Code § 22-34-3(a); Ala. Admin. Code §§ 335-11-1-.01(g), 335-11-1-.09.

<sup>79</sup> *See* Ala. Admin. Code §§ 335-11-1-.04, 335-11-1-.05.

<sup>80</sup> 40 C.F.R. § 35.3150.

<sup>81</sup> *E.g.*, ADEM, *CWSRF Intended Use Plan, Fiscal Year 2022*, *supra* n.77, Att. 5 at 2-5.

<sup>82</sup> *E.g.*, *id.* at Att. 5.

<sup>83</sup> *Id.* at Att. 5 at 1, 5; Ala. Admin. Code § 335-11-1-.11.

<sup>84</sup> *See* ADEM, *State Revolving Fund (SRF)* (“How to Apply”), <https://bit.ly/3VLDMBG>; Ala. Admin. Code §§ 335-11-1-.01(q), 335-11-1-.03(2), 335-11-1-.04.

assistance it will provide for each, and what amount of that assistance will be additional subsidies.<sup>85</sup>

### **C. Title VI and EPA's Title VI regulations**

Title VI prohibits recipients of federal funding from discriminating based on race.<sup>86</sup> A recipient of federal funds must commit to and practice non-discrimination in all its activities.<sup>87</sup>

Congress directed federal agencies to publish rules to effectuate Title VI.<sup>88</sup> Under EPA's regulations, "[n]o person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race."<sup>89</sup> This extends beyond intentional discrimination to practices that cause disparate harm: "A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race . . . or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race."<sup>90</sup>

To establish a prima facie case of disparate impact, EPA must (1) identify the specific policy or practice at issue, (2) establish harm, (3) establish disparity, and (4) establish causation.<sup>91</sup>

### **V. ADEM and the State of Alabama are violating Title VI and EPA's implementing regulations by preventing use of the Clean Water State Revolving Fund for onsite sanitation needs, which causes disparate harm to Black residents**

Despite the glaring need in Alabama, ADEM has never used the Clean Water State Revolving Fund to support onsite sanitation projects. Instead, it has adopted a combination of rules and policies that make doing so impossible. This causes disparate harm to Black residents, in violation of Title VI.

#### **A. Alabama's administration of the Clean Water State Revolving Fund bars the award of funds to support onsite sanitation needs**

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<sup>85</sup> See, e.g., ADEM, *CWSRF Intended Use Plan, Fiscal Year 2022*, supra n.77, Att. 1 & 2.

<sup>86</sup> 42 U.S.C. § 2000d.

<sup>87</sup> *Id.* §§ 2000d, 2000d-4a.

<sup>88</sup> *Id.* § 2000d-1.

<sup>89</sup> 40 C.F.R. § 7.30.

<sup>90</sup> *Id.* § 7.35(b).

<sup>91</sup> U.S. EPA, *External Civil Rights Compliance Office Compliance Toolkit* 8 (Jan. 18, 2017), <https://bit.ly/3XdtOdH> ("EPA, *Toolkit*"); *N.Y. City Env't'l Justice All. v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000); DOJ, *Title VI Legal Manual*, supra n.7, Section VII at 9. Complainants themselves need not prove disparity or harm; complainants need only allege facts that, if true, may violate EPA's Title VI regulations. See 65 Fed. Reg. 39,650, 39,672 (June 27, 2000); EPA, *Case Resolution Manual*, supra n.1, at 17.

## 1. ADEM unduly limits recipient eligibility to public bodies

ADEM regulations only allow public bodies to apply for and receive State Revolving Fund support.<sup>92</sup> In Alabama, people who rely on onsite sanitation must pay for it themselves; towns, counties, and other public bodies do not assume the cost. ADEM's rules exclude potential recipients who would otherwise be eligible under the Clean Water Act to receive State Revolving Fund money for onsite sanitation needs at individual households.<sup>93</sup>

Many other states do not have this restriction. Rhode Island, for example, defines eligible recipients broadly and includes corporations and persons, not just local governments.<sup>94</sup> Delaware similarly makes loans not just to municipalities, but also to private organizations, nonprofit organizations, and private individuals.<sup>95</sup> Oregon lends to “nonprofit Community Development Financial Institutions for the specific purpose of lending to individual homeowners for the repair or replacement of a failing septic system, or connection to a public sewer system.”<sup>96</sup> West Virginia coordinates with two intermediary lenders, which receive State Revolving Fund money and then make loans directly to homeowners to repair or replace failing onsite sewage systems.<sup>97</sup> Other states, including Iowa, Maryland, and Missouri, provide similar opportunities.<sup>98</sup> But Alabama's program strictly limits State Revolving Fund awards to public bodies.<sup>99</sup>

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<sup>92</sup> Ala. Admin. Code §§ 335-11-1-.01(e), 335-11-1-.01(t), 335-11-1-.01(s), 335-11-1-.02, 335-11-1-.09(10).

<sup>93</sup> 33 U.S.C. § 1383(c)(12).

<sup>94</sup> 250 R.I. Admin. Code § 150-20-1.6.A; *see also* State of R.I., *State Fiscal Year (SFY) 2023 Intended Use Plan 3*, <https://bit.ly/3il8vYB> (Rhode Island's State Revolving Fund “aim[s] to provide financial assistance to eligible local governmental units, persons, corporations, and sewer authorities for a variety of clean water infrastructure projects.”).

<sup>95</sup> *See* Del. Dep't of Natural Res. & Env't'l Control, *Delaware Water Pollution Control Revolving Fund*, <https://bit.ly/3Cpmm7a>.

<sup>96</sup> Ore. Dep't of Env't'l Quality, *Clean Water State Revolving Fund, Program Overview, Loan Eligibility*, <https://bit.ly/3QelUhl>.

<sup>97</sup> W.Va. Dep't of Env't'l Prot., *Clean Water State Revolving Fund, FY 2022 Annual Report 12* (Oct. 11, 2022), <https://bit.ly/3GHj6f>.

<sup>98</sup> Iowa Dep't of Natural Res., *Investing in Iowa's Water, FY 2023 Intended Use Plans 12* (June 21, 2022), <https://bit.ly/3Cs8SYf> (“On-Site Wastewater Assistance Program . . . provides loans to homeowners to replace inadequate septic systems.”); Md. Dep't of the Env't., *Linked Deposit WQRLF & DWRLF*, <https://bit.ly/3IlxUfz> (describing availability of Clean Water State Revolving Fund money to homeowners and private entities through the state's Linked Deposit program, to replace failing onsite septic systems); Mo. Dep't of Natural Res., *Clean Water State Revolving Fund Intended Use Plan and Project Priority Lists for Federal Fiscal Year 2023 4*, 13 (Nov. 4, 2022), <https://bit.ly/3X0PHfY> (describing Onsite Wastewater System Grant program for qualified nonprofits to offer grants to repair or replace failing or poorly functioning onsite wastewater systems serving private, single-family homes); *see also, e.g.,* EPA, *Financing Decentralized Wastewater Treatment Systems*, *supra* n.19, at 18, 22, 30 (additional examples).

<sup>99</sup> ADEM's regulations might conceivably allow an award of Clean Water State Revolving Fund money to the Alabama Department of Public Health to support individual homeowners' onsite sanitation needs, but that would be ill-advised and possibly counterproductive. Residents are understandably distrustful of ADPH because it has discretion to penalize those who cannot afford functioning onsite sanitation systems with fines or even refer them for criminal prosecution. *See supra* n.22. And ADPH is itself the subject of a pending

It is unclear whether this limitation is mandated by Alabama state law; the statute is ambiguous.<sup>100</sup> Even if mandated by state law, it is no less relevant under Title VI; it would mean the State of Alabama, through the legislature, is responsible alongside ADEM for the effects of this restriction.<sup>101</sup> Because public entities are not responsible for the cost of onsite sanitation in Alabama, this restriction impedes the use of Clean Water State Revolving Fund money for onsite sanitation needs.

## **2. ADEM's priority ranking system makes it impossible for onsite sanitation projects to compete for funding**

Separately, ADEM's priority ranking system for State Revolving Fund applications excludes applicants that rely on onsite sanitation from competing for an award. Alabama's priority ranking system is attached to each year's Intended Use Plan.<sup>102</sup> Out of 475 total points, ADEM awards 10 points for projects that will "upgrade or replace existing failing or inadequate decentralized wastewater treatment systems, or construct septic treatment facilities that are crucial to the proper operation of decentralized wastewater treatment systems."<sup>103</sup> An additional five points are available for projects that will implement a Total Maximum Daily Load (TMDL) for pathogens, and another five points for projects that will implement a TMDL for organic enrichment/dissolved oxygen, either of which conceivably could apply to an onsite sanitation remediation project (but only if that project will eliminate or reduce pollution in an impaired surface water with a TMDL).<sup>104</sup> None of the other factors in ADEM's priority ranking system is relevant to onsite sanitation.

With at most 20 out of 475 available points, it is effectively impossible for an applicant with onsite sanitation needs to qualify for funding. In 2022, for example, ADEM did not fund

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discrimination complaint and ongoing federal investigation related to its onsite wastewater disposal program. *See supra* n.10.

<sup>100</sup> *See* Ala. Code § 22-34-2 (statutory intent of Alabama's Clean Water State Revolving Fund program is "to aid in the prevention and control of water pollution, to provide state financial aid *to public bodies* for the prevention and control of water pollution, and to these ends . . . to pay such portion of the estimated reasonable cost of the projects of each *public body* as may be required to meet the water quality goals of the Federal Clean Water Act" (emphasis added)). But state law also provides that money in the revolving loan fund shall be available to provide for any expenditure "consistent with the federal grant program and state law," *id.* § 22-34-3(a), which would allow the award of funds to nonprofits and not just public entities, per 33 U.S.C. § 1383(c)(12), (j). And state law gives ADEM the authority to enter into contracts not just with public bodies but also "other parties," as necessary to implement the revolving loan fund. Ala. Code § 22-34-3(b).

<sup>101</sup> *See* DOJ, *Title VI Legal Manual*, *supra* n.7, Section V at 26 ("An entire state . . . may, however, be liable for Title VI violations if it is partially responsible for the discriminatory conduct."); *United States v. City of Yonkers*, 880 F. Supp. 212, 232 & n.25 (S.D.N.Y. 1995) (holding that "the State of New York itself," not just state agencies, may be sued under Title VI), *vacated and remanded on other grounds*, 96 F.3d 600 (2d Cir. 1996); *see also* 40 C.F.R. § 7.25 (defining "recipient" for purposes of Title VI applicability to include "any State *or* its political subdivision" (emphasis added)).

<sup>102</sup> *See, e.g.*, ADEM, *CWSRF Intended Use Plan, Fiscal Year 2022*, *supra* n.77, Att. 5.

<sup>103</sup> *Id.* Att. 5 at 3.

<sup>104</sup> *Id.*

any project that earned fewer than 100 points through the regular Clean Water State Revolving Fund program,<sup>105</sup> or fewer than 65 points through the Bipartisan Infrastructure Law appropriation.<sup>106</sup> The way ADEM's ranking system is designed, onsite sanitation projects cannot compete.

Other states provide a far greater percentage of available points for onsite sanitation needs. North Carolina awards 15 out of 100 possible points for projects that would eliminate failed onsite wastewater systems.<sup>107</sup> Illinois awards 200 out of 1455 possible points available for projects to provide wastewater treatment and collection services in communities that do not have centralized wastewater treatment and that discharge to surface waters.<sup>108</sup> Relatively speaking, both states provide about five times more weight to onsite sanitation needs than Alabama. Some states, including Arkansas and Massachusetts, bypass their point systems entirely in order to dedicate some State Revolving Fund money just for onsite sanitation.<sup>109</sup>

Under the Clean Water Act and EPA regulations, states retain significant discretion to adopt project ranking criteria.<sup>110</sup> ADEM has used that discretion to foreclose the chance of onsite sanitation projects ever winning State Revolving Fund support.

### **3. ADEM refuses to consider financial need when ranking project applications**

ADEM does not consider financial need in its priority ranking system.<sup>111</sup> Affordability comes into play only as a tiebreaker: if multiple projects are assigned an identical point rating, the project that serves a community with the lowest median household income will be ranked first.<sup>112</sup> Again, many other states do include affordability within their priority ranking systems, including Colorado, Illinois, and North Carolina.<sup>113</sup> And although a recent

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<sup>105</sup> *Id.* Att. 1 (fourth column).

<sup>106</sup> ADEM, *CWSRF BIL Intended Use Plan, Fiscal Year 2022* Att. 1 (fourth column), <https://bit.ly/3QhFPMO>.

<sup>107</sup> See, e.g., N.C. Div. of Water Infrastructure, *North Carolina Clean Water State Revolving Fund and Bipartisan Infrastructure Law CWSRF General Supplemental Funds Intended Use Plan Fiscal Year 2022* Appx. C at C-2 (Aug. 8, 2022), <https://bit.ly/3HwLBpR> (“N.C. Div. of Water Infrastructure, *Intended Use Plan FY22*”).

<sup>108</sup> 35 Ill. Admin. Code § 365.345(f).

<sup>109</sup> Ark. Dep’t of Agric., *State of Arkansas, Clean Water Revolving Loan Fund Program (CWSRF) Intended Use Plan, State Fiscal Year 2023* 11 (Oct. 24, 2022), <https://bit.ly/3vBJnjo> (\$2 million pilot project to assist residents “in remediating their failing onsite septic systems”); Comm. of Mass., Dep’t of Env’t Prot., *Final 2022 Intended Use Plan for the Clean Water State Revolving Fund 2* (May 9, 2022), <https://bit.ly/3CnYFMD> (directing \$5 million to the Commonwealth’s Community Septic Management Program to “remediate failed septic systems in participating communities”).

<sup>110</sup> See 40 C.F.R. § 35.3150.

<sup>111</sup> ADEM, *CWSRF Intended Use Plan, Fiscal Year 2022*, *supra* n.77, Att. 5 at 2-5.

<sup>112</sup> Ala. Admin. Code § 335-11-1-.04(3).

<sup>113</sup> See Colo. Water Pollution Control Revolving Fund, *2021 Intended Use Plan* Att. I, <https://bit.ly/3VMlXec>; 35 Ill. Admin. Code § 365.345(k); N.C. Div. of Water Infrastructure, *Intended Use Plan FY22*, *supra* n.107, Appx. C at C-5.

EPA memo advised that states may need to redistribute project priority points “to ensure disadvantaged communities are receiving funding,”<sup>114</sup> ADEM has not done so.

By not considering financial need in the ranking system, ADEM prevents those with the most severe sanitation needs—including people with straight pipes—from moving up the priority list. These residents tend to be low-income or to live in communities that qualify as disadvantaged, and they are therefore in the greatest need of federally subsidized Clean Water State Revolving Fund support.<sup>115</sup>

#### **4. ADEM withholds available subsidies that would benefit onsite sanitation projects for low-income residents**

For at least the past four years, ADEM has limited its planned amount of additional subsidy to the bare minimum required by federal law, rather than providing it to more people and communities with financial need. In recent years, the Clean Water Act, in combination with annual appropriations bills, has required states to provide at least 10 percent and up to 30 percent of each year’s capitalization grant as additional subsidization.<sup>116</sup> (In 2022, the minimum was 20 percent, and the maximum was 40 percent.<sup>117</sup>)

Since 2019, ADEM has announced in its Intended Use Plans that it will provide the minimum amount of additional subsidy required by law.<sup>118</sup> And in practice, ADEM has

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<sup>114</sup> EPA, *Implementation Memo*, supra n.55, at 4.

<sup>115</sup> In the Black Belt counties with data on straight pipe prevalence—Wilcox, Hale, and Lowndes—the percentage of people living below the poverty line is much higher than the state average. And poverty in all three counties is divided along racial lines, with a significantly greater percentage of Black than white residents living below the poverty line. An estimated 27.4 percent of people in Wilcox County, 24.9 percent of people in Hale County, and 21.5 percent of people in Lowndes County live below the poverty line, compared to an estimated 16.1 percent statewide. In Wilcox County, 35.7 percent of Black residents live below the poverty line, compared to 6.4 percent of white residents. In Hale County, 32.3 percent of Black residents live below the poverty line, compared to 11.7 percent of white residents. In Lowndes County, 25.8 percent of Black residents live below the poverty line, compared to 8 percent of white residents. See U.S. Census Bureau, American Community Survey Table S1701, Poverty Status in the Past 12 Months, <http://bit.ly/3Yq4NwU> (Wilcox County), <http://bit.ly/3JVrq7P> (Hale County), <http://bit.ly/3lpsoiz> (Lowndes County), <http://bit.ly/3YC21UL> (Alabama statewide).

<sup>116</sup> 33 U.S.C. § 1383(i)(3)(B) (2014) (as amended by the Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, 128 Stat. 1193, 1325-26 (June 10, 2014)) (codifying 30 percent maximum subsidization amount); Pub. L. No. 116-6, 133 Stat. 13, 238 (Feb. 15, 2019) (setting 10 percent minimum subsidization amount for FY19); Pub. L. No. 116-94, 133 Stat. 2534, 2719 (Dec. 20, 2019) (10 percent minimum for FY20); Pub. L. No. 116-260, 134 Stat. 1182, 1511 (Dec. 27, 2020) (10 percent minimum for FY21).

<sup>117</sup> 33 U.S.C. § 1383(i)(3)(B)(i); Pub. L. No. 117-103, 136 Stat. 49, 384-85 (Mar. 15, 2022); ADEM, *CWSRF Intended Use Plan, Fiscal Year 2022*, supra n.77, at 3 (stating requirement to provide additional subsidization for not less than 20 percent of the capitalization grant in FY22).

<sup>118</sup> ADEM, *CWSRF Intended Use Plan, Fiscal Year 2019* 3-4, Att. 1 at 1, <https://bit.ly/3ZnxsDE> (sixth column, showing intended subsidy of \$1,776,700); ADEM, *CWSRF Intended Use Plan, Fiscal Year 2020* 3, Att. 1 at 1, <https://bit.ly/3Coit2u> (intended subsidy of \$1,777,000); ADEM, *CWSRF Intended Use Plan, Fiscal Year 2021* 3,

awarded even less than the minimum: in fiscal years 2019 through 2021, ADEM fell short of its planned additional subsidy totals by more than \$360,000 combined.<sup>119</sup>

By providing additional subsidies up to the maximum allowed by federal law, ADEM could cover the cost for low-income homeowners with urgent unmet needs.<sup>120</sup> Instead, ADEM has withheld more than \$13 million in potential additional subsidies since 2019.<sup>121</sup>

Moreover, until 2022, ADEM's subsidization policy included two restrictions that prevented people with onsite sanitation needs from receiving a subsidized Clean Water State Revolving Fund award at all. ADEM only awarded additional subsidies to green infrastructure projects intended to mitigate or prevent stormwater pollution.<sup>122</sup> That blocked subsidies for onsite sanitation. ADEM also limited loan forgiveness to no more than 50 percent of a project's cost.<sup>123</sup> That closed the door to potential low-income applicants who needed a 100 percent subsidy.

Last year, ADEM amended its policy to allow it to subsidize a broader range of projects, at up to 100 percent cost.<sup>124</sup> But by routinely limiting its intended subsidy amount to the minimum required, ADEM denies available funds to those who desperately need them.<sup>125</sup>

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Att. 1 at 1, <https://bit.ly/3GD9mxg> (intended subsidy of \$1,776,700); ADEM, *CWSRF Intended Use Plan, Fiscal Year 2022*, supra n.77, at 3, Att. 1 at 1 (intended subsidy of \$2,587,600).

<sup>119</sup> EPA, *Clean Water NIMS Data Report, Clean Water SRF Program Information for the State of Alabama*, <https://bit.ly/3icmNLh> (row 324, page 67, columns 2019 to 2021, showing total annual subsidy provided of \$4,966,300 for those three years) (“EPA, *Clean Water NIMS Data Report*”).

<sup>120</sup> Izenberg et al., *Nocturnal Convenience*, supra n.13, at 203 (“Because the need for costly installation of alternative systems or repair/replacement of poorly functioning or failing septic systems is locally great, low-income households and communities require external funds if they are to fix the problem themselves.”).

<sup>121</sup> ADEM, *CWSRF Intended Use Plan, Fiscal Year 2019*, supra n.118, Att. 1 (subsidizing \$1,776,700 out of a possible \$5,330,100); ADEM, *CWSRF Intended Use Plan, Fiscal Year 2020*, supra n.118, Att. 1 (\$1,777,000 out of \$5,331,000); ADEM, *CWSRF Intended Use Plan, Fiscal Year 2021*, supra n.118, Att. 1 (\$1,776,700 out of \$5,330,100); ADEM, *CWSRF Intended Use Plan, Fiscal Year 2022*, supra n.77, Att. 1 (\$2,587,600 out of \$5,175,200).

<sup>122</sup> ADEM, *CWSRF Intended Use Plan, Fiscal Year 2021*, supra n.118, Att. 4 at 3-4.

<sup>123</sup> *Id.*

<sup>124</sup> ADEM, *CWSRF Intended Use Plan, Fiscal Year 2022*, supra n.77, Att. 4.

<sup>125</sup> Under the Clean Water Act, additional subsidization is limited to “a municipality or intermunicipal, interstate, or State agency”; it is not available for individuals, non-profits, or businesses. 33 U.S.C. § 1383(i)(1)(A). But as explained below, many states (not including Alabama) use financing mechanisms that facilitate pass-through of financial support from municipalities to individuals. See EPA, *Interpretive Guidance for Certain Amendments in the Water Resources Reform and Development Act to Titles I, II, V, and VI of the Federal Water Pollution Control Act* 17 (Jan. 6, 2015), <https://bit.ly/3VGaTH6> (“[E]ligible recipients of a principal forgiveness or negative interest loan may use a ‘pass through’ loan structure to pass the subsidy along to any eligible recipient of [Clean Water State Revolving Fund] assistance for projects that would otherwise be eligible to receive additional subsidization under this subsection, including non-profits and other private entities.”) (“EPA, *Interpretive Guidance*”).

## **5. ADEM does not conduct meaningful outreach to people with onsite sanitation needs**

ADEM conducts inadequate outreach to individuals and communities with onsite sanitation needs, and ADEM does not appear to have any written outreach plan. Even if ADEM changed its policies to allow funding to individuals or to facilitate pass-through grants or loans, the State Revolving Fund will only be valuable to individuals and communities who know about it and apply for support.

There is no evidence of outreach to underserved or marginalized communities on ADEM's State Revolving Fund website.<sup>126</sup> Nor is there evidence that ADEM conducts outreach to promote the State Revolving Fund's availability for onsite sanitation. In contrast, ADEM "actively solicited" applications for green infrastructure projects, by sending a notice to approximately 1,000 addresses on ADEM's email and direct mail list.<sup>127</sup> ADEM should actively solicit applications from underserved communities and for onsite sanitation in particular. "A passive approach yields a disproportionate number of applications from well-resourced communities,"<sup>128</sup> which disadvantages low-income communities and individuals with onsite sanitation needs.

Other states are more proactive. Delaware, for example, has a Community Septic System Outreach program, to help homeowners take advantage of the State Revolving Fund for septic system rehabilitation.<sup>129</sup> Delaware's outreach initiative affirmatively "identifies low- and moderate-income homeowners . . . that may need financial assistance to replace failed and/or failing septic systems," with a goal of replacing 100 failed or failing systems each year.<sup>130</sup>

Public interest advocates filed comments with ADEM in September 2022, urging the state to expand its public outreach efforts.<sup>131</sup> Those comments recommended that ADEM hold public outreach meetings around the state, accessible both in terms of timing and location for disadvantaged community members, and especially in rural areas of the state.<sup>132</sup> ADEM offered a dismissive response that did not identify any affirmative outreach to disadvantaged communities or to individuals with onsite sanitation needs.<sup>133</sup>

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<sup>126</sup> ADEM, *State Revolving Fund (SRF)*, <https://bit.ly/3VLDMBG>.

<sup>127</sup> ADEM, *FY2020 CWSRF Annual Report 1*, 6 (Sept. 30, 2020), <https://bit.ly/3GiZ9EG>.

<sup>128</sup> Hammer & Hansen, *Fairer Funding*, *supra* n.54, at 15.

<sup>129</sup> Del. Dep't of Natural Res. & Env't'l Control, *Community Septic System Outreach*, <https://bit.ly/3WOgQmD>.

<sup>130</sup> *Id.*

<sup>131</sup> Letter from Cindy Lowry, Ala. Rivers Alliance, et al., to Brian Espy, ADEM 6-7 (Sept. 2, 2002) (Ex. 10).

<sup>132</sup> *Id.* at 7.

<sup>133</sup> Letter from Russell A. Kelly, ADEM, to Cindy Lowry, Ala. Rivers Alliance, et al. 3 (Sept. 28, 2022) (Ex. 11).

Unless ADEM conducts meaningful outreach, many people and communities with onsite sanitation needs will never apply for Clean Water State Revolving Fund support.

## **6. ADEM restricts financing options in a way that blocks awards for onsite sanitation projects**

ADEM does not offer flexible financing mechanisms that would allow it to support onsite sanitation needs. ADEM's Intended Use Plans state that Alabama's State Revolving Fund program "provides all assistance by purchasing outstanding debt obligations (bonds) from the borrower."<sup>134</sup> That bars participation by nonprofits, individuals, homeowners' associations, and communities that do not issue bonds. These potential recipients are already ineligible because of the public body restriction discussed above; ADEM's bond purchase policy creates a separate and additional hurdle. This limitation is apparently an informal policy, repeated annually in ADEM's Intended Use Plans but not required by state statute or regulation.<sup>135</sup> This policy closes off both conventional and alternative financing opportunities used in many other states for onsite sanitation needs.

Other states structure their awards to allow money to support individual onsite sanitation needs. Common options include pass-through lending, linked deposit mechanisms, and sponsorship.<sup>136</sup> This is especially important to enable additional subsidization to low-income residents for onsite systems: Without pass-through loans, individuals cannot benefit from additional subsidization at all.<sup>137</sup> Many states use innovative financing mechanisms precisely so that State Revolving Fund money can "reach individual homeowners for decentralized wastewater projects and upgrades."<sup>138</sup> Alabama does not.

ADEM's financing policy thus limits potential funding recipients to a single route for securing State Revolving Fund support. A wider range of financing options—combined with a change to ADEM's recipient eligibility requirement—would dramatically expand the pool of applicants who could win State Revolving Fund support for onsite sanitation projects.

\* \* \*

These six policies operate separately and together to preclude Clean Water State Revolving Fund awards for onsite sanitation in Alabama. Correcting one policy in isolation will not cure the problem. Expanding recipient eligibility alone, for example, will not help if ADEM does not also allow alternative financing mechanisms, revise the ranking system, conduct meaningful outreach, and provide greater subsidies. Enhanced outreach, on its own, will not help if onsite sanitation projects are ineligible for an award, cannot compete under the project ranking system, and are not subsidized.

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<sup>134</sup> ADEM, *CWSRF Intended Use Plan, Fiscal Year 2022*, supra n.77, at 5.

<sup>135</sup> Ala. Code § 22-34-3(a); Ala. Admin. Code §§ 335-11-1-.01(g), 335-11-1-.09.

<sup>136</sup> EPA, *Financing Decentralized Wastewater Treatment Systems*, supra n.19, at 14-23, 30.

<sup>137</sup> See EPA, *Interpretive Guidance*, supra n.125, at 17.

<sup>138</sup> EPA, *Financing Decentralized Wastewater Treatment Systems*, supra n.19, at 8.

To illustrate: A homeowner with straight pipes will not know about available funding to help with onsite sanitation because ADEM does not conduct adequate outreach. Even if the homeowner happens to find out about it, they cannot apply for money directly or through a local nonprofit because individuals and nonprofits are not eligible. Even if their town or county is willing to apply on their behalf and then forward the funds, it still might not be affordable for the homeowner because ADEM offers so little loan forgiveness. Even if they had a chance at complete loan forgiveness, their application would not be selected for funding because it could not get enough points in the ranking system. These independent barriers make ADEM's State Revolving Fund program uniquely inhospitable to onsite sanitation projects.

Yet the Clean Water State Revolving Fund can and should be a “robust source of funding for decentralized wastewater projects.”<sup>139</sup> Indeed, other states provide significant financial support for onsite sanitation through their revolving fund programs: Massachusetts, for example, has awarded \$128.8 million in total for decentralized wastewater projects; Minnesota more than \$95 million; Ohio more than \$63 million, and Washington more than \$42 million.<sup>140</sup> EPA has specifically highlighted state efforts to use revolving fund money to replace straight pipes elsewhere in the country.<sup>141</sup> In contrast to other states, Alabama has never used the Clean Water State Revolving Fund to support onsite sanitation needs,<sup>142</sup> despite the obvious and widespread need.<sup>143</sup>

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<sup>139</sup> U.S. EPA, *2019 Annual Report: Building the Project Pipeline, Clean Water State Revolving Fund 3* (Sept. 2020), <https://bit.ly/3jVVipS>.

<sup>140</sup> EPA, *Access to a Treatment Works*, supra n.24, at 9.

<sup>141</sup> U.S. EPA, *Clean Water State Revolving Fund Programs, 2018 Annual Report, Funding Water Quality Solutions: Expanding the CWSRF* 18 (Apr. 2019), <https://bit.ly/3vEXTXS>.

<sup>142</sup> EPA, *Clean Water NIMS Data Report*, supra n.119 (row 162, pages 26-29, columns 1988 to 2021). ADEM did announce plans to support sewer system rehabilitation in the Town of Hayneville in its 2022 Bipartisan Infrastructure Law Intended Use Plan. ADEM, *CWSRF BIL Intended Use Plan, Fiscal Year 2022*, supra n.106, Att. 1 at 1, Att. 2 at 2. The decrepit sewer system in Hayneville has exposed residents to raw sewage backups and overflows for years. The sewer rehabilitation in Hayneville is an important project that, if competently performed, will reduce or eliminate residents' exposure to raw sewage. But it is not an onsite sanitation or decentralized wastewater system project. In Hayneville's project application, it did not claim any points for an onsite sanitation component. See Town of Hayneville, *Form 340: Clean Water State Revolving Fund Preapplication* 3 (Jan. 28, 2022), <https://bit.ly/3Itiupt>. The rebuilt system will rely on septic tanks with effluent pumps that connect to sewer mains, and those tanks will be operated and maintained by the Town of Hayneville and not individual residents. See Town of Hayneville, *Preliminary Engineering Report* 3 (Apr. 26, 2022), <https://bit.ly/3id6UUH>.

<sup>143</sup> Last year, the Alabama legislature made a one-time appropriation of “up to” \$5 million from American Rescue Plan Act funds to provide “grants to install clustered decentralized wastewater system demonstration utilizations . . . in the Alabama Black Belt areas of low population density, rural [poverty], and/or soils with poor perc characteristics, where there is a finding of discharge of raw sewage onto the ground due to the utilization of straight pipes, failing septic systems, or similar circumstances.” Memorandum of Agreement between the State of Alabama Department of Finance and the Alabama Department of Environmental Management for the Distribution of Coronavirus State Fiscal Recovery Funds 2, 9 (March 2022), <https://bit.ly/3IlpdBx>. ADEM did not disburse this funding through the Clean Water State Revolving Fund, and this is not a recurring or multi-year appropriation.

**B. Alabama's administration of the Clean Water State Revolving Fund causes disproportionate harm to Black residents**

ADEM's failure to support onsite sanitation needs through the Clean Water State Revolving Fund disproportionately harms Black residents of Alabama.

As noted above, there is incomplete information on onsite sanitation system failure and the use of straight pipes in Alabama (in significant part because of the state's historic indifference to this problem and punitive enforcement of state laws).<sup>144</sup> But all existing data shows that Black residents are disproportionately burdened by lack of sanitation access. In a survey in Hale County—more than 57 percent Black<sup>145</sup>—65 percent of unsewered homes lacked permitted onsite systems.<sup>146</sup> In a survey in Wilcox County—more than 70 percent Black<sup>147</sup>—90 percent of unsewered homes relied on straight pipes or other unpermitted sewage system.<sup>148</sup> And in Lowndes County—more than 72 percent Black<sup>149</sup>—40 to 90 percent of households have inadequate or no onsite sanitation.<sup>150</sup>

Black Alabama residents are almost four times as likely as white residents to live in the Black Belt.<sup>151</sup> Problems with sanitation access are especially acute in the Black Belt, where many homes must rely on onsite sanitation systems. The region's impermeable soil is not suitable for conventional onsite sanitation,<sup>152</sup> and systems that are engineered to function better in low permeable soils cost much more money.<sup>153</sup> Most counties in the Black Belt also have high rates of poverty compared to other Alabama counties, and thus many of the region's residents are simply unable to afford functioning onsite sanitation on their own.<sup>154</sup> The result is rampant onsite sanitation system failure and widespread straight pipe use throughout the Black Belt, with accompanying harms to people's health, the environment, and quality of life.

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<sup>144</sup> Flowers, *Waste*, supra n.11, at 19-20; ACRE, *Flushed and Forgotten*, supra n.22, at 5, 28-29; U.N. Human Rights, *Statement on Visit to the USA*, supra n.23, at ¶ 44.

<sup>145</sup> U.S. Census Bureau, *QuickFacts, Hale County, Alabama*, <https://bit.ly/3RjpLe7>.

<sup>146</sup> EPA, *Surface Discharge of Raw Wastewater*, supra n.27, at 35-36.

<sup>147</sup> U.S. Census Bureau, *QuickFacts, Wilcox County, Alabama*, <https://bit.ly/3Hmpm65>.

<sup>148</sup> EPA, *Surface Discharge of Raw Wastewater*, supra n.27, at 31.

<sup>149</sup> U.S. Census Bureau, *QuickFacts, Lowndes County, Alabama*, <https://bit.ly/3wDafAb>.

<sup>150</sup> See U.N. General Assembly, *Report of the Special Rapporteur*, supra n.19, at 6 ¶ 20.

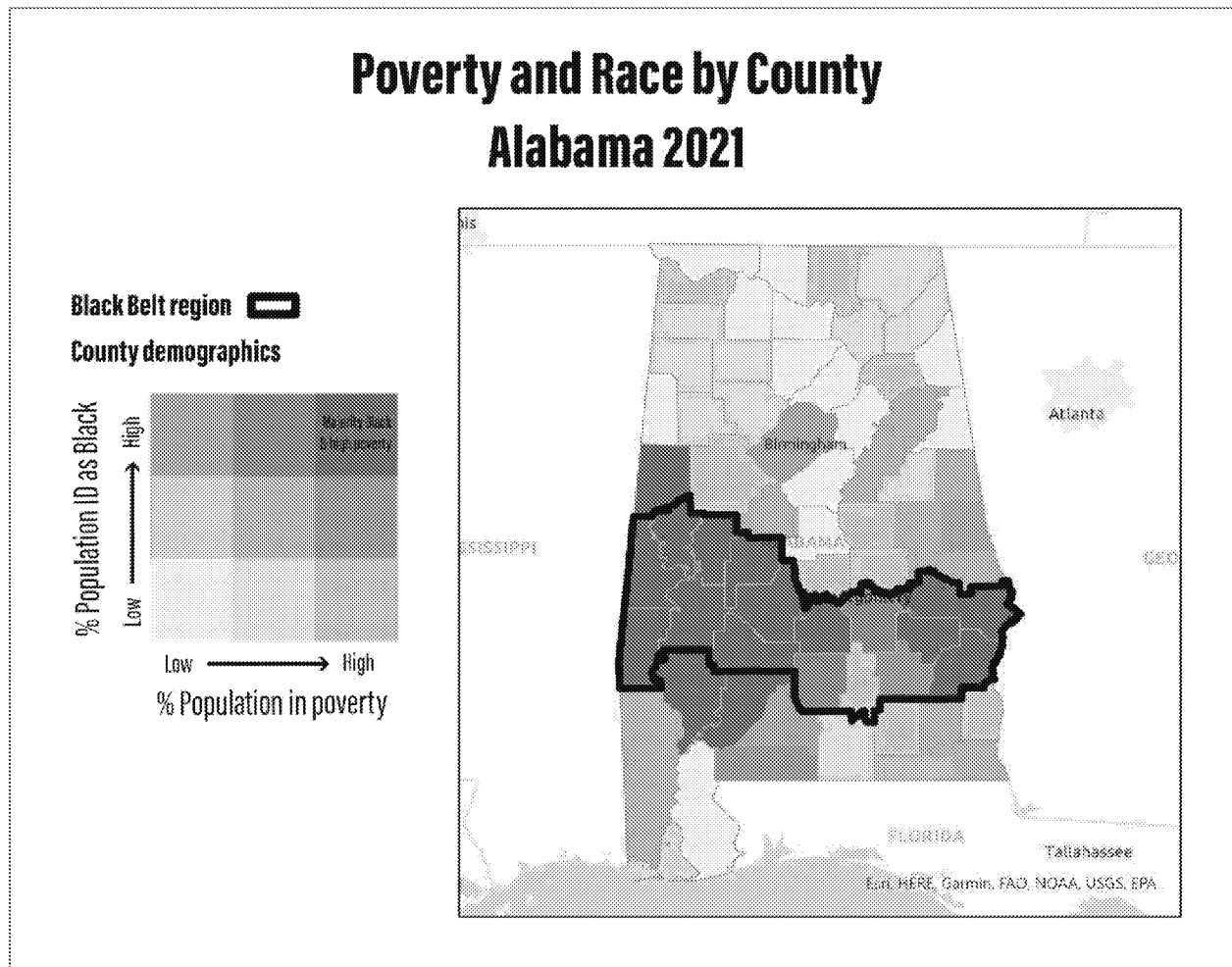
<sup>151</sup> Probability for Black residents = 0.23; probability for white residents = 0.06. Probabilities calculated from U.S. Census Bureau's American Community Survey (ACS) 2017-2021 5-year estimates, Table B03002, <https://bit.ly/3kgDUFH>.

<sup>152</sup> He et al., *Assessing the Status of Onsite Wastewater Treatment Systems*, supra n.12, at 693, 697-99.

<sup>153</sup> E.g., Izenberg et al., *Nocturnal Convenience*, supra n.13, at 202.

<sup>154</sup> *Id.* at 201, 202; Katsinas et al., *Poverty, Housing, & GDP in Alabama's Black Belt*, supra n.17, at 1-4.

The map below shows that 76 percent of Black Belt counties are characterized by both high poverty and a high percentage of people who identify as Black.<sup>155</sup> The Alabama counties with high rates of poverty and high percentages of people who identify as Black are concentrated in the Black Belt,<sup>156</sup> where roughly 90 percent of the land is unsuited to conventional onsite sanitation.<sup>157</sup>



<sup>155</sup> Mapped data from U.S. Census Bureau, American Community Survey (ACS) 2017-2021 5-year estimates, Tables B03002 (<https://bit.ly/3XcDxkP>) and S1701 (<http://bit.ly/3YiJixq>), created on Esri ArcGIS Pro.

<sup>156</sup> Of the 17 counties in the Black Belt, 13 have high rates of poverty (top third) and high percentages of people who identify as Black (top third) and are shown as deep purple on the map: Barbour, Bullock, Choctaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Perry, Russell, Sumter, and Wilcox. Two Black Belt counties, Butler and Montgomery, have medium rates of poverty (middle third) and high percentages of people who identify as Black (top third) and are shown in light purple on the map. One Black Belt county, Pike, has high rates of poverty (top third) and a medium percentage of people who identify as Black (middle third) and is shown as blue on the map. And one Black Belt county, Crenshaw, has low rates of poverty (bottom third) and a medium percentage of people who identify as Black (middle third) and is shown as pink on the map. Calculated from U.S. Census Bureau, American Community Survey (ACS) 2017-2021 5-year estimates, Tables B03002 and S1701.

<sup>157</sup> He et al., *Assessing the Status of Onsite Wastewater Treatment Systems*, supra n.12, at 695.

Thus, this subset of the state population—low-income or low-wealth Black residents in the Black Belt—are more likely to need financial support through the State Revolving Fund for onsite sanitation access. And the harms from inadequate onsite sanitation disproportionately undermine these residents’ health, local environmental conditions, and quality of life. By thwarting use of the State Revolving Fund for onsite sanitation needs, ADEM and the State of Alabama not only perpetuate these harms but deny Black residents an equal opportunity to compete for federal funding, in violation of Title VI.<sup>158</sup>

## VI. Conclusion

Complainants respectfully request that EPA accept this complaint and investigate the State of Alabama and ADEM’s violations of Title VI and EPA’s implementing regulations. Complainants further request that the State of Alabama and ADEM be brought into compliance by requiring them to:

1. Allow disbursement of State Revolving Fund money to eligible nonprofit organizations, individuals, homeowners’ associations, and other entities for onsite sanitation needs, as authorized by federal law;
2. Amend the state’s priority ranking system, after public notice and comment, to eliminate the current handicap for onsite sanitation projects and to prioritize projects based on the applicant’s financial need;
3. Provide State Revolving Fund awards through fully forgivable loans to the maximum extent allowed by federal law, and direct those subsidized awards to communities with the greatest financial need;
4. Develop a comprehensive, written outreach plan, after public notice and comment, to promote state-wide awareness of the availability of State Revolving Fund grants and loans for onsite sanitation projects, and conduct outreach to disadvantaged and historically marginalized communities in compliance with that plan;
5. Adopt alternative financing mechanisms to allow State Revolving Fund money to reach individual residents with onsite sanitation needs to the greatest possible extent.

EPA’s guiding principles for implementing Title VI are relevant here: All persons, regardless of race, are entitled to a safe and healthful environment. Strong civil rights enforcement is essential. And enforcement of civil rights and environmental laws can be achieved together.<sup>159</sup>

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<sup>158</sup> The potential availability of other funding sources for onsite sanitation needs, including for example through USDA, does not excuse discriminatory administration of the Clean Water State Revolving Fund. And the Clean Water State Revolving Fund is “the largest source of federal funding” for wastewater infrastructure projects in the country. U.S. EPA, *Utilization of Additional Subsidization Authority in the Clean Water and Drinking Water State Revolving Fund Programs, Report to Congress 2* (Apr. 2014), <https://bit.ly/3HiXKP8>.

<sup>159</sup> See 65 Fed. Reg. at 39,669. Note that improved funding availability for onsite sanitation systems is only one step—but an important and meaningful step—towards an ultimately just solution to the problem of sanitation inequity in Alabama. Other components of the problem include the state’s failure to require warranties against manufacturing and installation defects for onsite systems; inadequate climate resilience policies; discriminatory enforcement of state laws governing onsite sanitation; insufficient capacity to treat septage; and poorly managed, outdated centralized wastewater treatment facilities in some areas.

We appreciate your prompt consideration of this complaint.

Respectfully,

/s/ Micah West

Micah West  
Southern Poverty Law Center  
400 Washington Avenue  
Montgomery, AL 36130  
micah.west@splcenter.org  
334-314-8976  
For Complainants CREEJ and NRDC

/s/ Catherine Flowers

Catherine Flowers  
Michael Graham  
Center for Rural Enterprise and Environmental Justice  
cflowers@creej.org  
mgraham@creej.org

/s/ Aaron Colangelo

Aaron Colangelo  
Sarah Tallman  
Rebecca Hammer  
Kimberly Leefatt  
Alyssa Brown  
Natural Resources Defense Council  
acolangelo@nrdc.org  
stallman@nrdc.org  
rhammer@nrdc.org  
kleefatt@nrdc.org  
alyssabrown@nrdc.org

cc: JuanCarlos M. Hunt, Director, EPA Office of Civil Rights

Message

---

**From:** Colangelo, Aaron [acolangelo@nrdc.org]  
**Sent:** 3/6/2023 2:24:24 PM  
**To:** Title VI Complaints [Title\_VI\_Complaints@epa.gov]; Hoang, Anhthu [Hoang.Anhthu@epa.gov]; Dorka, Lilian [Dorka.Lilian@epa.gov]  
**Subject:** Title VI Complaint exhibits 1-3  
**Attachments:** Exhibit 1.pdf; Exhibit 2.pdf; Exhibit 3.pdf

Director Dorka and Dr. Hoang,  
Attached are supporting exhibits 1-3 of 11.

---

**From:** Colangelo, Aaron  
**Sent:** Monday, March 6, 2023 9:07 AM  
**To:** Title\_VI\_Complaints@epa.gov; Hoang.Anhthu@epa.gov; Hunt.Juancarlos@epa.gov  
**Cc:** cflowers@creej.org; mgraham@creej.org; Micah West <micah.west@splcenter.org>; Tallman, Sarah <stallman@nrdc.org>; Hammer, Rebecca <rhammer@nrdc.org>; Leefatt, Kimberly <KLeefatt@nrdc.org>; Brown, Alyssa <AlyssaBrown@nrdc.org>  
**Subject:** Title VI Complaint

Dr. Hoang, attached is a Title VI complaint being submitted by the Center for Rural Enterprise and Environmental Justice and the Natural Resources Defense Council. Supporting exhibits will follow by separate email.

Best,  
Aaron Colangelo  
202-289-2376

Message

---

**From:** Colangelo, Aaron [acolangelo@nrdc.org]  
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**Subject:** Title VI Complaint exhibits 4-5  
**Attachments:** Exhibit 4.pdf; Exhibit 5.pdf

Director Dorka and Dr. Hoang,  
Attached are exhibits 4-5 of 11.

---

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**Cc:** [cflowers@creej.org](mailto:cflowers@creej.org); [mgraham@creej.org](mailto:mgraham@creej.org); Micah West <[micah.west@splcenter.org](mailto:micah.west@splcenter.org)>; Tallman, Sarah <[stallman@nrdc.org](mailto:stallman@nrdc.org)>; Hammer, Rebecca <[rhammer@nrdc.org](mailto:rhammer@nrdc.org)>; Leefatt, Kimberly <[KLeefatt@nrdc.org](mailto:KLeefatt@nrdc.org)>; Brown, Alyssa <[AlyssaBrown@nrdc.org](mailto:AlyssaBrown@nrdc.org)>  
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**Sent:** 3/6/2023 2:28:44 PM  
**To:** Title VI Complaints [Title\_VI\_Complaints@epa.gov]; Hoang, Anhthu [Hoang.Anhthu@epa.gov]; Dorka, Lilian [Dorka.Lilian@epa.gov]  
**Subject:** Title VI Complaint exhibit 6  
**Attachments:** Exhibit 6.pdf

Director Dorka and Dr. Hoang,  
Attached is exhibit 6 of 11.

---

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**Subject:** Title VI Complaint exhibits 1-3

Director Dorka and Dr. Hoang,  
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**Cc:** [cflowers@creej.org](mailto:cflowers@creej.org); [mgraham@creej.org](mailto:mgraham@creej.org); Micah West <[micah.west@splcenter.org](mailto:micah.west@splcenter.org)>; Tallman, Sarah <[stallman@nrdc.org](mailto:stallman@nrdc.org)>; Hammer, Rebecca <[rhammer@nrdc.org](mailto:rhammer@nrdc.org)>; Leefatt, Kimberly <[KLeefatt@nrdc.org](mailto:KLeefatt@nrdc.org)>; Brown, Alyssa <[AlyssaBrown@nrdc.org](mailto:AlyssaBrown@nrdc.org)>  
**Subject:** Title VI Complaint

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Best,  
Aaron Colangelo  
202-289-2376

Message

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**From:** Colangelo, Aaron [acolangelo@nrdc.org]  
**Sent:** 3/6/2023 2:30:45 PM  
**To:** Title VI Complaints [Title\_VI\_Complaints@epa.gov]; Hoang, Anhthu [Hoang.Anhthu@epa.gov]; Dorka, Lilian [Dorka.Lilian@epa.gov]  
**Subject:** Title VI Complaint exhibits 7-11  
**Attachments:** Exhibit 7.pdf; Exhibit 8.pdf; Exhibit 9.pdf; Exhibit 10.pdf; Exhibit 11.pdf

Director Dorka and Dr. Hoang,  
Attached are exhibits 7 to 11 of 11. Apologies for the many emails! Hard copies will follow by mail.  
Best,  
Aaron Colangelo

---

**From:** Colangelo, Aaron  
**Sent:** Monday, March 6, 2023 9:28 AM  
**To:** 'Title\_VI\_Complaints@epa.gov' <Title\_VI\_Complaints@epa.gov>; 'Hoang.Anhthu@epa.gov' <Hoang.Anhthu@epa.gov>; 'Dorka.Lilian@epa.gov' <Dorka.Lilian@epa.gov>  
**Subject:** Title VI Complaint exhibit 6

Director Dorka and Dr. Hoang,  
Attached is exhibit 6 of 11.

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**Subject:** Title VI Complaint exhibits 4-5

Director Dorka and Dr. Hoang,  
Attached are exhibits 4-5 of 11.

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**Subject:** Title VI Complaint exhibits 1-3

Director Dorka and Dr. Hoang,  
Attached are supporting exhibits 1-3 of 11.

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**Subject:** Title VI Complaint

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Aaron Colangelo  
202-289-2376

Message

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**From:** Colangelo, Aaron [acolangelo@nrdc.org]  
**Sent:** 3/6/2023 2:06:54 PM  
**To:** Title VI Complaints [Title\_VI\_Complaints@epa.gov]; Hoang, Anhthu [Hoang.Anhthu@epa.gov]; Hunt, JuanCarlos [Hunt.Juancarlos@epa.gov]  
**CC:** cflowers [cflowers@creej.org]; mgraham@creej.org; Micah West [micah.west@splcenter.org]; Tallman, Sarah [stallman@nrdc.org]; Hammer, Rebecca [rhammer@nrdc.org]; Leefatt, Kimberly [KLeefatt@nrdc.org]; Brown, Alyssa [AlyssaBrown@nrdc.org]  
**Subject:** Title VI Complaint  
**Attachments:** 2023-3-6 CREEJ and NRDC Title VI complaint.pdf

Dr. Hoang, attached is a Title VI complaint being submitted by the Center for Rural Enterprise and Environmental Justice and the Natural Resources Defense Council. Supporting exhibits will follow by separate email.

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Message

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**Attachments:** Exhibit 1.pdf; Exhibit 2.pdf; Exhibit 3.pdf

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Aaron Colangelo  
202-289-2376

Message

---

**From:** Jenkins, Brandi [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9B3EA7AACD1A44C0AB3EE9A8F0A2EA3F-JENKINS, BRANDI]  
**Sent:** 5/10/2022 4:43:24 PM  
**To:** Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Allenbach, Becky [Allenbach.Becky@epa.gov]; Bermudez, Navis [Bermudez.Navis@epa.gov]; Wade, Alexis [Wade.Alexis@epa.gov]; Nagrani, Kavita [Nagrani.Kavita@epa.gov]  
**CC:** Wise, Allison [Wise.Allison@epa.gov]; Rubini, Suzanne [Rubini.Suzanne@epa.gov]  
**Subject:** Fwd: Lawsuit: EPA Must Protect Manatees From Water Pollution

FYII

Brandi Jenkins, Public Affairs Director  
U.S. EPA - Region 4  
(678) 575-2148 (mobile)  
(404) 562-9124 (office)

Sent from my iPhone

Begin forwarded message:

**From:** Amy Green <agreen@wmfe.org>  
**Date:** May 10, 2022 at 12:35:58 PM EDT  
**To:** "Jenkins, Brandi" <Jenkins.Brandi@epa.gov>  
**Subject:** FW: Lawsuit: EPA Must Protect Manatees From Water Pollution

Hi Brandi,

Does the EPA have any comment? Thanks!

Amy

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**From:** Ragan Whitlock <rwhitlock@biologicaldiversity.org>  
**Sent:** Tuesday, May 10, 2022 10:44 AM  
**To:** Amy Green <agreen@wmfe.org>  
**Subject:** Lawsuit: EPA Must Protect Manatees From Water Pollution

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For Immediate Release, May 10, 2022

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## **Lawsuit: EPA Must Protect Manatees From Water Pollution**

### ***Hundreds Starved to Death in 2021 Because Unchecked Pollution is Killing Seagrass***

ORLANDO, *Fla.*— Three conservation groups sued the U.S. Environmental Protection Agency today for failing to protect manatees and sea turtles from water pollution in Florida.

Over half of the more than 1,000 manatee deaths in Florida in 2021 were attributable to starvation. The mass die-off is being caused by pollution-fueled algal blooms that have killed thousands of acres of seagrass in the Indian River Lagoon, highlighting the inadequacy of the state's federally approved water-quality standards.

Earthjustice is representing the Center for Biological Diversity, Save the Manatee Club and Defenders of Wildlife. Today's lawsuit, filed in federal court in the Middle District of Florida, pushes the court to require the EPA to reinitiate consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service under the Endangered Species Act to reassess its approval of Florida's water-quality standards for the Indian River Lagoon.

The Florida manatee is currently experiencing an officially declared unusual mortality event along Florida's east coast, which includes important manatee warm-water habitat like the Indian River Lagoon. The lagoon supports more species of plants and animals than any other estuary in North America.

"Manatees need clean water to live in — it's that simple," said Earthjustice attorney Elizabeth Forsyth. "The pollution in the Indian River Lagoon is preventable. We're asking EPA to step in and ensure the protection of the Indian River Lagoon and the species that depend on it."

Unchecked pollution in the Indian River Lagoon — stemming from wastewater-treatment discharges, leaking septic systems, fertilizer runoff and other sources — fuels algal blooms that kill seagrass and prevent it from growing back. Nearly a decade ago, the EPA approved the state's water-quality criteria for nitrogen and phosphorous, concluding the standards would not "adversely affect" manatees. New information, including the mass die-off of manatees in the lagoon, calls this conclusion into question.

"Hundreds of manatees are dying in the Indian River Lagoon as the water quality plummets, and the EPA must confront the massive nutrient pollution behind this disaster," said Ragan Whitlock, an attorney at the Center for Biological Diversity. "The existing water-quality standards just aren't strong enough to preserve this important ecosystem and save these amazing animals."

Florida's 2021 manatee deaths were more than double the average annual death rate over the previous five years. The number of deaths represents 19% of the Atlantic population of Florida manatees and 12.5% of all manatees in Florida.

"Florida's beloved manatees will continue to suffer and die as long as EPA maintains inadequate water quality standards," said Jane Davenport, senior attorney at Defenders of Wildlife. "There simply is no more time for EPA to waste in reinitiating consultation."

State and federal agency staff continued to witness high levels of malnourished and starving manatees throughout the winter of 2021-22, implementing a first-of-its-kind supplemental feeding program. In recent weeks the surrounding water has warmed, causing the manatees to disperse, and the program has been suspended. Unfortunately many manatees continue to suffer the long-term health consequences of starvation.

“Although nothing we do will bring back those nearly 1,000 manatees that suffered and died from years of neglect despite repeated warnings, we insist that the EPA join forces with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to ensure that improved water quality standards are expeditiously set and met to bring an end to this travesty.” said Patrick Rose, an aquatic biologist and executive director of Save the Manatee Club, who has worked for over 45 years to help bring the species back from near extinction since it was first listed as endangered in 1967.

The U.S. Fish and Wildlife Service downlisted the manatee from endangered to threatened in 2017. Since then the species has suffered significant setbacks from habitat degradation, red tide, cold winters and now unprecedented mass starvation from the catastrophic seagrass die-off.

Florida manatee (Trichechus manatus latirostris). Credit: Jim Reid, USFWS. Image is available for media use.

Florida manatee (*Trichechus manatus latirostris*). Credit: Jim Reid, USFWS. [Image is available for media use.](#)

*The Center for Biological Diversity is a national, nonprofit conservation organization with more than 1.7 million members and online activists dedicated to the protection of endangered species and wild places.*

*Earthjustice, the nation's premier nonprofit environmental law organization, wields the power of law and the strength of partnership to protect people's health, to preserve magnificent places and wildlife, to advance clean energy, and to combat climate change. Because the earth needs a good lawyer.*

*Save the Manatee Club is an international nonprofit based in Florida with its mission to protect manatees and their aquatic habitat for future generations. The Club was founded in 1981 by former Florida Governor and U.S. Senator Bob Graham and singer-songwriter Jimmy Buffett to protect and advocate on behalf of the species. Today, Save the Manatee Club is the world's leading manatee conservation organization. To learn more about the world's leading voice for manatees, visit [savethemanatee.org](http://savethemanatee.org)*

*Defenders of Wildlife is celebrating 75 years of protecting all native animals and plants in their natural communities. With a nationwide network of nearly 2.2 million members and activists, Defenders of Wildlife is a leading advocate for innovative solutions to safeguard our wildlife heritage for generations to come. For more information, visit [defenders.org/newsroom](http://defenders.org/newsroom) and follow us on Twitter [@Defenders](https://twitter.com/Defenders).*



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Center for Biological Diversity, P.O. Box 710, Tucson, AZ 85702 United States

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

CALIFORNIA COMMUNITIES AGAINST  
TOXICS  
P.O. Box 845  
Rosamond, CA 93560

CLEAN POWER LAKE COUNTY  
347 Douglas Ave.  
Waukegan, IL 60085

RIO GRANDE INTERNATIONAL STUDY  
CENTER  
1 West End Washing St., Bldg. P-11  
Laredo, TX 78040

SIERRA CLUB  
2101 Webster St., Suite 1300  
Oakland, CA 94612

UNION OF CONCERNED SCIENTISTS  
Two Brattle Square  
Cambridge, MA 02138,

*Plaintiffs,*

v.

MICHAEL S. REGAN, in his official capacity  
as Administrator, United States Environmental  
Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, DC 20460,

*Defendant.*

Civil Action No. 1:22-cv-3724

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

**INTRODUCTION**

1. This is a suit to compel the Administrator of the U.S. Environmental Protection Agency (“EPA”) to take actions required by the Clean Air Act (“Act”) to protect the public from ethylene oxide emitted from commercial sterilizer facilities. *See* 42 U.S.C. §§ 7401-7671. Under the Clean Air Act, EPA is required limit air emissions of cancer-causing pollutants, like ethylene

oxide, by promulgating National Emission Standards for Hazardous Air Pollutants (“NESHAP” or “air toxics standards”). *Id.* § 7412(d). Furthermore, EPA must “review, and revise as necessary” these standards “no less often than every 8 years.” *Id.* § 7412(d)(6).

2. EPA first issued air toxics standards for commercial sterilizers in 1994. *National Emission Standards for Hazardous Air Pollutants for Ethylene Oxide Commercial Sterilization and Fumigation Operations*, 59 Fed. Reg. 62,585 (Dec. 6, 1994). Despite EPA’s duty to review and revise the section 112(d) standards no less often than every 8 years, EPA did not issue another rule until 2006. *Ethylene Oxide Emissions Standards for Sterilization Facilities*, 67 Fed. Reg. 17,712 (April 7, 2006).

3. More than 16 years have passed since EPA last reviewed and revised its emission standards for commercial sterilizers.

4. For the past 8 years, EPA has been in ongoing violation of the Clean Air Act. 42 U.S.C. § 7412(d)(6).

5. EPA’s failure to review and revise the air toxics standards for commercial sterilizers has caused and is continuing to cause harm to Plaintiffs’ members who live, work, and recreate near commercial sterilizers. EPA’s violation of the Act has left emission standards in place for more than 8 years without review or revision, exposing Plaintiffs’ members to hazardous air pollution from insufficiently regulated commercial sterilizers.

6. To remedy EPA’s failure to comply with its statutory obligation, Plaintiffs seek declaratory and injunctive relief compelling EPA to review and, as necessary, revise the air toxic standards for the commercial sterilizer source category as expeditiously as possible.

### **JURISDICTION AND VENUE**

7. This action arises under the Clean Air Act, 42 U.S.C. § 7412(d)(6).

8. This Court has jurisdiction pursuant to 42 U.S.C. § 7604(a) and 28 U.S.C. §§ 1331 and 1361.

9. This Court may grant the relief Plaintiffs request pursuant to 42 U.S.C. § 7604(a)(2) and 28 U.S.C. §§ 2201(a), 2202, and 1361. Plaintiffs have a right to bring this action pursuant to the Clean Air Act, 42 U.S.C. § 7604(a)(2); 28 U.S.C. § 1361.

10. Plaintiffs provided the Administrator with written notice of this action on September 20, 2022, as required by the Clean Air Act, 42 U.S.C. § 7604(b)(2), and 40 C.F.R. Part 54. As sixty days have passed since these submissions, Plaintiffs have satisfied the notice requirements in 42 U.S.C. § 7604(b)(2).

11. Venue is proper in this Court under 28 U.S.C. § 1391(e) because the Defendant, EPA Administrator Michael S. Regan, resides in this district.

### **PARTIES**

12. Plaintiff California Communities Against Toxics (“CCAT”) is a nonprofit organization headquartered in Rosamond, California. CCAT is an environmental justice network of member groups that advocates for environmental justice and protection from toxic air pollution in the State of California and nationally. Through public education, advocacy, and community organizing, CCAT aims to reduce individuals’ exposure to pollution, to expand knowledge about the effects of toxic chemicals on human health and the environment, and to protect the most vulnerable people from harm.

13. Plaintiff Clean Power Lake County (“CPLC”) is a nonprofit organization headquartered in Highland Park, Illinois. CPLC is a community-driven coalition committed to

local action to secure environmental, economic, and racial justice. CPLC's mission is to ensure clean air, clean water, and healthy soil for every Lake County community member and to achieve the self-determination of those disproportionately impacted by environmental pollution.

14. Plaintiff Rio Grande International Study Center ("RGISC," pronounced "risk"), is a chartered nonprofit organization headquartered in Laredo, Texas, and founded in January 1994. RGISC is a frontline environmental advocacy group dedicated to using science, data, people power, and creative actions to preserve and protect the Rio Grande-Rio Bravo watershed, local ecosystems, and its people. RGISC pushes for a positive vision of our South Texas border region via research, public awareness campaigns, grassroots building, signature community events, and advocacy for local ordinances and policy making.

15. Plaintiff Sierra Club is a nonprofit corporation with its headquarters located in Oakland, California. Sierra Club is a national membership organization dedicated to the protection of public health and the environment, including clean air, with chapters in Arizona, California, Colorado, Georgia, Maryland, Michigan, Missouri, Ohio, Pennsylvania, Texas, Utah, Wisconsin, and other states, and with more than 800,000 members who reside in all 50 states, the District of Columbia, and U.S. territories.

16. Plaintiff The Union of Concerned Scientists ("UCS") is a national nonprofit organization founded in 1969 by scientists at the Massachusetts Institute of Technology. UCS's headquarters are located in Cambridge, Massachusetts, with offices in Washington, DC; Oakland, California; and Chicago, Illinois. UCS's mission is to achieve a healthier planet and a safer world by fostering independent, science-based solutions that improve people's lives. UCS has more than 500,000 members and supporters across the United States, along with 24,000

members of its Science Network, a group of scientists and technical experts across the country who are working to ensure science informs decisions that affect health, safety, and environment.

17. Defendant Michael Regan is the Administrator of the EPA. In that role he is charged with the duty to uphold the Clean Air Act and to implement the required regulatory actions by the relevant statutory deadlines. 42 U.S.C. § 7601.

### **FACTUAL BACKGROUND: ETHYLENE OXIDE**

18. Ethylene oxide is a flammable, colorless, gas. Since the 1940s, ethylene oxide's mutagenetic, or DNA-damaging, properties have been well known to scientists.<sup>1</sup> Because of this quality, ethylene oxide gas is used as one of many methods to sterilize medical equipment.

19. Ethylene oxide is also incredibly toxic to humans. In 2016, EPA's Integrated Risk Information System ("IRIS") program completed a long-awaited evaluation of the inhalation carcinogenicity of ethylene oxide. The evaluation found that based on the weight of the evidence, ethylene oxide is "'carcinogenic to humans' by the inhalation route of exposure."<sup>2</sup> Based on this conclusion, EPA determined that ethylene oxide is 60 times more toxic than previously understood, with a greater risk posed to children, whose cells divide more frequently than adults.<sup>3</sup>

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<sup>1</sup> EPA, IRIS, Evaluation of the Inhalation Carcinogenicity of Ethylene Oxide, Executive Summary at 5-6 (Dec. 2016), [https://cfpub.epa.gov/ncea/iris/iris\\_documents/documents/subst/1025\\_summary.pdf](https://cfpub.epa.gov/ncea/iris/iris_documents/documents/subst/1025_summary.pdf).

<sup>2</sup> *Id.* at 2.

<sup>3</sup> EPA established a cancer risk factor for ethylene oxide of  $3.0 \times 10^{-3}$  per  $\mu\text{g}/\text{m}^3$  for adult exposure, or  $5.0 \times 10^{-3}$  per  $\mu\text{g}/\text{m}^3$  over a lifetime, accounting for increased vulnerability from early-life exposure. *Id.* at 5-6; *see* EPA, Frequent Questions about Ethylene Oxide (EtO), <https://www.epa.gov/hazardous-air-pollutants-ethylene-oxide/frequent-questions-about-ethylene-oxide-eto>.

20. In 2018, EPA’s air office applied the new IRIS risk value to the 2014 National Emissions Inventory to better understand the risks posed by ethylene oxide to communities. This study—known as the 2014 National Air Toxics Assessment—found that ethylene oxide contributed to a cancer risk equal to or greater than 100-in-one million, EPA’s benchmark for “unacceptable risk,” in 58 census tracts across the United States. These “high risk” areas include census tracts where commercial sterilizers are located and where Plaintiffs’ members live, work, and recreate.

21. Despite this information, EPA has failed to update its air toxics emission standards for commercial sterilizers as the Clean Air Act requires. In 2019, EPA’s own National Environmental Justice Advisory Council—in response to public input from members of communities affected by ethylene oxide emissions—urged EPA to prioritize the regulation of ethylene oxide air emissions and to meaningfully involve affected communities in the regulatory process.

22. In 2021, EPA’s Office of the Inspector General (“OIG”) urged EPA to fulfill its overdue duty to complete a new rulemaking that would protect “people in some areas of the country” from “unacceptable health risks from ...ethylene oxide emissions.”<sup>4</sup> The OIG’s report noted that “[i]n the absence of updated reviews for the applicable source categories, the Agency cannot provide assurance that its current NESHAPs are protective” of public health.<sup>5</sup>

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<sup>4</sup> EPA OIG, EPA Should Conduct New Residual Risk and Technology Reviews for Chloroprene- and Ethylene Oxide-Emitting Source Categories to Protect Human Health, Report No. 21-P-0129 (May 6, 2021), [https://www.epa.gov/sites/default/files/2021-05/documents/\\_epaoig\\_20210506-21-p-0129.pdf](https://www.epa.gov/sites/default/files/2021-05/documents/_epaoig_20210506-21-p-0129.pdf).

<sup>5</sup> *Id.* at 21.

## STATUTORY AND REGULATORY BACKGROUND

23. Congress enacted the Clean Air Act “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b)(1). One “primary goal” of the statute is “pollution prevention.” *Id.* § 7401(c).

24. As part of its duty to implement the Clean Air Act, Congress tasked EPA with regulating emissions from a list of hazardous air pollutants, including ethylene oxide. 42 U.S.C. § 7412. To effectuate that goal, Congress first tasked EPA with creating a list of “all categories and subcategories” of all sources of air pollutants from Congress’s initial list of hazardous air pollutants. 42 U.S.C. § 7412(c)(1). Based on this list of categories, Congress tasked EPA with establishing emission standards that require “the maximum degree of reduction in emissions of the hazardous air pollutants” for new and existing sources that is “achievable.” 42 U.S.C. § 7412(c)(2), (d)(2).

25. But EPA’s duty to protect the public health from hazardous air pollutants does not end after it sets an initial set of emission standards. The Clean Air Act directs EPA to “review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards [for each source category] ... every 8 years.” 42 U.S.C. § 7412(d)(6). In this rulemaking, EPA must make all revisions “necessary” to bring standards into full compliance with the Clean Air Act, including: (1) setting limits on uncontrolled hazardous air pollutant emissions, *see Louisiana Env’tl. Action Network (LEAN) v. EPA*, 955 F.3d 1088, 1096 (D.C. Cir. 2020); and (2) removing illegal exemptions and loopholes for emissions during startup, shutdown, and malfunction periods. *See, e.g., Sierra Club v. EPA*, 551 F.3d 1019, 1028 (D.C. Cir. 2008); *NRDC v. EPA*, 749 F.3d 1055, 1062-64 (D.C. Cir. 2014). Thus, every 8 years,

the Administrator must review emissions standards and promulgate either a revision of the standards or a determination that no revision is “necessary.” 42 U.S.C. § 7412(d)(6)

**ALLEGATIONS: EPA’S FAILURE TO TIMELY REVIEW (AND REVISE AS NECESSARY) THE COMMERCIAL STERILIZER RULE**

26. Here, EPA promulgated its first set of emission standards for commercial sterilizers in 1994. 59 Fed. Reg. 62,585. Among other requirements, this rule set emission limits for three sections of a commercial sterilization facility: sterilization chamber vents, aeration room vents, and chamber exhaust vents. But in 2001, the agency amended the rule to remove the emission limits for chamber exhaust vents. *Ethylene Oxide Emissions Standards for Sterilization Facilities*, 66 Fed. Reg. 55,577 (Nov. 2, 2001).

27. Since promulgating its first NESHAP for sterilizers in 1994, EPA has not strengthened the emission standards for commercial sterilization facilities.

28. In 2006, EPA completed a risk and technology review of the commercial sterilizer NESHAP and decided “not to revise the Ethylene Oxide Emission Standards for Sterilization Facilities, originally promulgated on December 6, 1994.” 67 Fed. Reg. 17,712.

29. EPA was legally required to complete a new review rulemaking pursuant to section 112(d)(6) no later than April 7, 2014.

30. EPA failed to complete a new review rulemaking by April 7, 2014.

31. An additional review rulemaking, taking into account technological changes since 2014, was due on April 7, 2022.

32. EPA failed to complete this additional review rulemaking by April 7, 2022.

33. Despite issuing an advance notice of proposed rulemaking in 2019, 84 Fed. Reg. 67,889 (Dec. 12, 2019), EPA has yet to issue a proposed or final rule or other final action to fulfill its legal obligation. EPA is in breach of its legal duty to complete a new review rulemaking under the Clean Air Act.

### **PLAINTIFFS' INJURIES**

34. EPA's failure to review, and if necessary, revise commercial sterilizer emission standards, as section 112(d)(6) requires, is harming and will continue to harm Plaintiffs and their members.

35. Commercial sterilizers emit ethylene oxide, which is a highly carcinogenic chemical that also causes damage to the brain and nervous systems.

36. Many of these emissions are fugitive, emitted during the process of sterilizing a product, or after the sterilization process when a product "off-gases" ethylene oxide.

37. EPA currently allows commercial sterilizers to emit fugitive ethylene oxide emissions without implementing pollution controls.

38. Plaintiffs' members live, work, recreate, and engage in a variety of other activities near commercial sterilizers. Plaintiffs' members have no choice but to breathe ethylene oxide emitted by commercial sterilizers.

39. Plaintiffs' members are concerned about the presence of ethylene oxide in the communities where they live, work, recreate, and engage in other activities. As a result of these reasonable concerns about harms stemming from increased exposure to ethylene oxide, Plaintiffs' members' enjoyment of the activities which they previously enjoyed has been significantly diminished. Plaintiffs' members' recreational and aesthetic interests are harmed.

40. The Administrator's failure to take the action for commercial sterilizers required by section 112(d)(6) deprives Plaintiffs' members of the rulemaking and cleaner air that would result from such action. EPA's inaction prolongs and increases Plaintiffs' members' exposure to higher levels of ethylene oxide that harms Plaintiffs' members' health, recreational, and aesthetic interests, as described above. Performing the overdue rulemaking and assuring emissions reductions as required under section 112(d)(6) would avoid and reduce these exposures, and the resulting health, recreational, aesthetic, and other harms suffered by Plaintiffs' members.

41. In its overdue rulemaking, EPA would also have to "tak[e] into account developments in practices, processes, and control technologies," 42 U.S.C. § 7412(d)(6), such as fenceline monitoring and corrective action for fugitive air emissions of ethylene oxide, as well as other developments in pollution controls.

42. EPA would also have to comply with the D.C. Circuit's decision in *LEAN* to set limits on any uncontrolled emissions, like fugitive emissions. 955 F.3d at 1099-100.

43. The Administrator's failure to take the action for commercial sterilizers required by section 112(d)(6) also deprives Plaintiffs and their members of the opportunity to present written comments, data, documentary information, views, and arguments to EPA and have them considered by the agency and responded to as part of the overdue section 112(d)(6) rulemaking. The Administrator's failure to conduct the overdue rulemaking has thus denied Plaintiffs and their members the opportunity to seek greater health protections and emissions reductions and to have EPA consider and respond to such comments in taking the final action required by section 112(d)(6). This deprivation of the opportunity to present comments and arguments and have them considered and addressed by EPA impairs Plaintiffs' and their members' ability to serve and protect their interests and fulfill their organizational missions.

44. The Administrator's failure to take the action for commercial sterilizers required by section 112(d)(6) also deprives Plaintiffs and their members of information, including determinations from the Administrator pursuant to section 112(d)(6) and underlying evidence related to such determinations. Such information includes: the emission limitations existing sources have achieved; the current pollution control methods, practices, and technologies that could be or are being used to achieve emission reductions; the emissions that remain under the existing standards; and other information EPA would consider and make public during the overdue rulemaking that is relevant to the review and need for stronger emission standards. Plaintiffs and their members are entitled to information by law. *See, e.g.*, 42 U.S.C. § 7607(d)(3)-(6) (describing documents that must be made "open to public inspection" as part of section 112 rulemakings).

45. Plaintiffs need this information to advance their organizational purposes, including educating their members and constituents, and working to assure stronger health and environmental protections. Plaintiffs' members need this information to better understand the operations of and dangers posed by commercial sterilizer facilities near their homes, to take self-protective measures to minimize their exposure to ethylene oxide emitted by commercial sterilizers, and to work for stronger health and environmental protections.

46. A court order requiring EPA to promptly review, and if necessary, revise the regulations for commercial sterilizers complained of here, as the law requires, would redress Plaintiffs' and Plaintiffs' members' injuries.

### **CLAIM FOR RELIEF**

47. The allegations of all foregoing paragraphs are incorporated as if set forth fully here.

#### **Violation of Section 112(d)(6) of the Clean Air Act**

48. The Administrator's failure to review and revise as necessary the Ethylene Oxide Emissions Standards for Sterilization Facilities category in 40 C.F.R. Part 63, Subpart O, as required by section 112(d)(6) of the Act constitutes a "failure of the Administrator to perform ... [an] act or duty ... which is not discretionary" within the meaning of section 304(a)(2) of the Clean Air Act, 42 U.S.C. § 7604(a)(2).

49. Each day the Administrator fails to take these legally required actions, Defendant commits new, additional, and ongoing violations of the Clean Air Act.

### **PRAYER FOR RELIEF**

Plaintiffs respectfully request that the Court:

(1) Declare that EPA's failure to timely review the National Emission Standards for Hazardous Air Pollutants for commercial sterilizers, 40 C.F.R. Part 63, Subpart O, and either revise those standards as necessary or issue a final determination that such revisions are not necessary, as required by section 112(d)(6) of the Clean Air Act, constitutes a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" within the meaning of section 304(a)(2) of the Clean Air Act, 42 U.S.C. § 7604(a)(2).

(2) Order the Defendant Administrator to review the National Emission Standards for Hazardous Air Pollutants for commercial sterilizers, 40 C.F.R. Part 63, Subpart O, and either to revise them as necessary or to issue a determination that revision is not necessary, in accordance

with section 112(d)(6) of the Clean Air Act and pursuant to an expeditious deadline set by this Court;

- (3) Retain jurisdiction to ensure compliance with the Court's decree;
- (4) Award Plaintiffs the costs of this action, including attorneys' fees; and,
- (5) Grant such other relief as the Court deems just and proper.

DATED: December 14, 2022

Respectfully Submitted,

/s/ Marvin C. Brown IV

Marvin C. Brown IV (D.C. Bar No. 1753696)

Seth L. Johnson (D.C. Bar No. 1001654)

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*Counsel for Plaintiffs California Communities  
Against Toxics, Clean Power Lake County, Rio  
Grande International Study Center, Sierra Club,  
and Union of Concerned Scientists*

Message

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**From:** Jenkins, Brandi [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9B3EA7AACD1A44C0AB3EE9A8F0A2EA3F-JENKINS, BRANDI]  
**Sent:** 1/30/2023 9:21:18 PM  
**To:** Diaz, Denisse [Diaz.Denisse@epa.gov]  
**Subject:** Fwd: Earthjustice news - FL still using illegal Trump wetlands definition  
**Attachments:** image001.gif; 2023 01 30 Earthjustice letter to EPA re FL continued unlawful application of NWPR.pdf

Brandi Jenkins, Public Affairs Director  
U.S. EPA - Region 4  
(678) 575-2148 (mobile)  
(404) 562-9124 (office)

Sent from my iPhone

Begin forwarded message:

**From:** Bruce Ritchie <britchie@politico.com>  
**Date:** January 30, 2023 at 2:34:42 PM EST  
**To:** "Jenkins, Brandi" <Jenkins.Brandi@epa.gov>, "Pinkney, James" <Pinkney.James@epa.gov>  
**Subject:** Fw: Earthjustice news - FL still using illegal Trump wetlands definition

Do you have any comment on this letter, including the statement that EPA is allowing DEP to continue violating the law? Is DEP applying the outdated definition and is there another explanation for why that may be happening? Thanks.

From the letter:

*"EPA has allowed Florida to violate the law for too long. More than one year has passed since the court issued its decision in Pasqua Yaqui Tribe, and more than one year has passed since EPA notified DEP that it must apply the pre-2015 regulatory regime. And EPA has codified a new definition of waters of the United States, which Florida will no doubt delay in implementing for as long as possible. In the meantime, wetlands properly protected as waters of the United States are being destroyed across the state."*

Can you get back to me by 4? Thanks.

Bruce Ritchie  
POLITICO  
Florida environment and energy reporter  
850-385-1774 (land line, no texting)  
850-566-4518 (cell)  
britchie@politico.com  
Twitter: @bruceritchie

**From:** Julie Hauserman <JHauserman@earthjustice.org>  
**Sent:** Monday, January 30, 2023 12:08 PM  
**To:** Julie Hauserman <JHauserman@earthjustice.org>  
**Subject:** Earthjustice news - FL still using illegal Trump wetlands definition

**EXTERNAL SENDER:** Use caution with links and attachments.

Hi, More than a year ago, a court threw out the Trump administration's Waters of the United States (WOTUS) definition. But, inexplicably the DeSantis Administration is still using this illegal definition, which imperils Florida's wetlands.

**Today** Earthjustice sent the attached letter to the U.S. Environmental Protection Agency to once again warn that Florida is using an illegal definition of wetlands which need protection.

Florida's DEP is still using a vacated Trump administration rule that a federal court in Arizona threw out as illegal in August 2021 (Navigable Waters Protection Rule for Waters of the United States.) The Trump administration rule shrunk the amount of wetlands and waterways protected by the Clean Water Act in Florida and elsewhere. The rule now in place protects many more wetland acres.

- In September 2021, we alerted DEP to the federal court's decision, pointing out that the agency could not keep applying the illegal WOTUS rule. But DEP continued to apply it anyway.

- In October 2021, we alerted the court in our ongoing litigation over the state's wetlands permitting takeover scheme that Florida's continued use of an illegal WOTUS definition was only adding to the harm caused by DEP's illegal wetlands permitting program.

- In December 2021, EPA made clear to the state that Florida DEP could not continue using the illegal definition. But DEP hasn't stopped.

- In February 2022, we sent a letter to the Florida Chamber and the Association of Community developers, informing them that they face a liability risk using the illegal wetlands definition.

- Also, on a growing list of projects that will affect/destroy Florida wetlands, the DEP is making a determination that "no permit is required" – even when the actual current legal framework means those projects may require a permit. (Side note: under the current scheme, EPA is not getting notice of DEP's "no permit is required" determinations, so the EPA isn't able to comment or intervene to protect Waters of the United States.)

Earthjustice is representing the Center for Biological Diversity, Defenders of Wildlife, the Sierra Club, the Conservancy of Southwest Florida, the Florida Wildlife Federation, Miami Waterkeeper, and St. Johns Riverkeeper in a suit filed in Jan. 2021. The lawsuit – currently working its way through the courts - challenges the EPA's decision to let Florida take over wetlands permitting from the federal government. Among other things, the lawsuit alleges that in EPA's rush to push this through, the Trump administration skirted procedural requirements — failing even to make the state program legally effective.

**Contact:** Christina Reichert [creichert@earthjustice.org](mailto:creichert@earthjustice.org)

Julie Hauserman  
Earthjustice Outreach  
111 South Martin Luther King, Jr. Blvd  
Tallahassee, FL 32309  
C: 850-273-2898  
[earthjustice.org](http://earthjustice.org)

[facebook.com/earthjustice](https://facebook.com/earthjustice)  
[twitter.com/earthjustice](https://twitter.com/earthjustice)

*Because the earth needs a good lawyer*



*Via Email*

January 30, 2022

Director Radhika Fox  
Office of Water  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460  
[fox.radhika@epa.gov](mailto:fox.radhika@epa.gov)

**Re: Florida's Unlawful Application of the Navigable Waters Protection Rule to Determine Waters of the United States in State-Assumed Clean Water Act 404 Program**

Dear Director Fox:

After more than a year ignoring federal law, it is time for EPA to require Florida to stop applying the long-vacated 2020 Navigable Waters Protection Rule ("NWPR"). Florida's refusal to comply with federal law threatens national waters and wetlands, as well as the wildlife and communities that depend on them.

As you know, Florida assumed jurisdiction over the Clean Water Act's Section 404 dredge and fill permitting program on or about December 22, 2020. Since that time, the state has applied the NWPR definition of "waters of the United States" to determine the scope of its 404 jurisdiction. On August 30, 2021, a federal court vacated the NWPR as unlawful at the time of its adoption. *Pasqua Yaqui Tribe, et al. v. U.S. Env't Prot. Agency, et al.*, No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021). *Accord Navajo Nation v. Regan*, No. 2:20-CV-00602, 2021 WL 4430466 (D.N.M. Sept. 27, 2021). As the Court observed, the NWPR substantially reduced the number of waterways, including wetlands, protected under the Clean Water Act as compared to prior rules and practices. *Pasqua Yaqui Tribe*, 2021 WL 3855977, at \*5.

On September 1, 2021, we notified the Florida Department of Environmental Protection ("DEP") of its obligation to abide by the vacatur of the NWPR. Letter from Tania Galloni, Earthjustice, to Shawn Hamilton, Fla. Dep't Env't. Prot., Sept. 1, 2021 (Attachment 1). As we explained, it was critical that Florida act immediately to ensure protection of all waterways covered by the Clean Water Act. DEP did not respond.

Also in September 2021, the U.S. Army Corps of Engineers (“Corps”) and U.S. Environmental Protection Agency (“EPA”) announced that they had halted implementation of the NWPR nationwide and returned to the pre-2015 regulatory regime to define waters of the United States. *Current Implementation of Waters of the United States*, U.S. Env’t Prot. Agency, <https://www.epa.gov/wotus/current-implementation-waters-united-states> (updated Dec. 20, 2021) (Attachment 2). But still DEP continued to apply NWPR.

By letter to DEP dated December 9, 2021, EPA affirmed that the Clean Water Act and its implementing regulations require Florida to administer its 404 program consistent with the definition of “waters of the United States” under the pre-2015 regulatory regime. Letter from Daniel Blackman, U.S. Env’t Prot. Agency, to Emile Hamilton, Fla. Dep’t Env’t Prot., Dec. 9, 2021 (Attachment 3). EPA then reiterated Florida’s obligation to apply the pre-2015 regulatory regime in its January 31, 2022, letter. Letter from Jeananne Gettle, U.S. Env’t Prot. Agency, to John Truitt, Fla. Dep’t Env’t Prot., Jan. 31, 2022 (Attachment 4). Still, DEP refused to conform to the law.

Now for more than a year, Florida has continued to apply the unlawful, vacated NWPR to 404 actions, including determinations that no permit is required, enforcement and compliance decisions, and the issuance of general permits. We understand that DEP has been continuing to use the vacated portions of the Code of Federal Regulations containing the NWPR’s definition of waters of the United States for making jurisdictional determinations, and the agency is publicly directing the regulated community to the vacated definition. *WOTUS Determinations*, Fla. Dep’t Env’t Prot., <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/wotus-determinations> (last visited January 17, 2022) (using the “waters of the United States” definition in 40 C.F.R. 120—NWPR at the time—in option three for performing jurisdictional determinations) (Attachment 5). Florida is flouting federal law, and EPA is failing to step in.

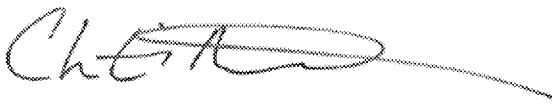
DEP has attempted to justify this flagrant violation in a number of ways, including saying the state was waiting for EPA’s clarification, then that the state had a year to comply with the change in federal law, and finally that a new rule would add another one-year period for the state to come into compliance. *See, e.g.*, House Environment, Agriculture and Flooding Subcommittee Hearing, at 21:10–24:15, <https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=7473>. None of those rationalizations hold water. Rather, they reveal that Florida’s actions are nothing more than the willful failure to regulate waters of the United States in Florida.

EPA has allowed Florida to violate the law for too long. More than one year has passed since the court issued its decision in *Pasqua Yaqui Tribe*, and more than one year has passed since EPA notified DEP that it must apply the pre-2015 regulatory regime. And EPA has

codified a new definition of waters of the United States, which Florida will no doubt delay in implementing for as long as possible. In the meantime, wetlands properly protected as waters of the United States are being destroyed across the state.

EPA must ensure that DEP comes into compliance and stops applying NWPR to the detriment of Florida's precious wetlands. Continued inaction is a de facto acceptance of DEP's flagrant disregard of the law, and EPA cannot turn a blind eye while Florida's critical wetlands are degraded and developed. We formally request a meeting with EPA to discuss this ongoing issue to ensure that DEP follows the law.

Sincerely,



Christina I. Reichert  
Senior Associate Attorney

Tania Galloni  
Managing Attorney

Bonnie Malloy  
Senior Attorney

Enc.

cc w/enc.:

Michael S. Regan, Administrator, EPA, [regan.michael@epa.gov](mailto:regan.michael@epa.gov)

John Goodin, Director, Office of Wetlands, Oceans and Watersheds, EPA, [goodin.john@epa.gov](mailto:goodin.john@epa.gov)

Macara Lousberg, Director, Water Policy Staff, EPA, [lousberg.macara@epa.gov](mailto:lousberg.macara@epa.gov)

Navis Bermudez, Deputy Assistant Administrator, Office of Policy, EPA,  
[bermudez.navis@epa.gov](mailto:bermudez.navis@epa.gov)

Lawrence Starfield, Acting Assistant Administrator, Acting Assistant Administrator, Office of  
Enforcement and Compliance, EPA, [starfield.lawrence@epa.gov](mailto:starfield.lawrence@epa.gov)

Shawn Hamilton, Secretary, Florida Department of Environmental Protection,  
[shawn.hamilton@floridadep.gov](mailto:shawn.hamilton@floridadep.gov)

Justin George Wolfe, Interim Deputy Secretary for Regulation, Florida Department of  
Environmental Protection, [justin.g.wolfe@dep.state.fl.us](mailto:justin.g.wolfe@dep.state.fl.us)

Chad Stevens, Acting General Counsel, Florida Department of Environmental Protection,  
[chad.r.stevens.@dep.state.fl.us](mailto:chad.r.stevens.@dep.state.fl.us)

Message

---

**From:** Jenkins, Brandi [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9B3EA7AACD1A44C0AB3EE9A8F0A2EA3F-JENKINS, BRANDI]  
**Sent:** 2/13/2023 6:47:17 PM  
**To:** Freeman, Caroline [Freeman.Caroline@epa.gov]; Chaffins, Randall [Chaffins.Randall@epa.gov]; Kemker, Carol [Kemker.Carol@epa.gov]; Zapata, Cesar [Zapata.Cesar@epa.gov]; Blevins, John (he/him/his) [Blevins.John@epa.gov]; Toney, Anthony [Toney.Anthony@epa.gov]; Johnson, Terry [Johnson.Terry@epa.gov]  
**CC:** Blackman, Daniel [Blackman.Daniel@epa.gov]; Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Nicholson, John [Nicholson.John@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Rubini, Suzanne [Rubini.Suzanne@epa.gov]; Nowell, Valerie [Nowell.Valerie@epa.gov]; Webster, James [Webster.James@epa.gov]; Wise, Allison [Wise.Allison@epa.gov]  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Attachments:** DiazBalart Letter to EPA Admin Regan on Doral FL Fire 02.13.23

Also, for awareness. We are starting to see a bit of incoming on this and Jim and I worked on a statement this morning (see below). Rep. Mario Diaz-Balart (FL-26) has also sent a letter to Administrator Regan (see attached).

Allison and I will work with Randall and Jim on a communications strategy while we are in our current posture.

*In coordination with the state of Florida, EPA is responding to a request from Miami-Dade County Fire to provide air monitoring and sampling assistance, in support of their efforts to address the ongoing fire at the Miami-Dade County Resources Recovery Center. At this time, EPA is deploying an emergency responder with contractor support to the Miami-Dade area to assist with air monitoring efforts as impacts to the ambient air are assessed. We will keep you abreast of any updates.*

Brandi

---

**From:** Freeman, Caroline <Freeman.Caroline@epa.gov>  
**Sent:** Monday, February 13, 2023 12:38 PM  
**To:** Chaffins, Randall <Chaffins.Randall@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Zapata, Cesar <Zapata.Cesar@epa.gov>; Blevins, John (he/him/his) <Blevins.John@epa.gov>; Toney, Anthony <Toney.Anthony@epa.gov>; Johnson, Terry <Johnson.Terry@epa.gov>; Jenkins, Brandi <Jenkins.Brandi@epa.gov>  
**Cc:** Blackman, Daniel <Blackman.Daniel@epa.gov>; Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; Nicholson, John <Nicholson.John@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Rubini, Suzanne <Rubini.Suzanne@epa.gov>; Nowell, Valerie <Nowell.Valerie@epa.gov>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

FYI – For Situational Awareness

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

**From:** Dominique Burkhardt <[dburkhardt@earthjustice.org](mailto:dburkhardt@earthjustice.org)>  
**Sent:** Monday, February 13, 2023 12:07 PM  
**To:** Geis, Stacey <[Geis.Stacey@epa.gov](mailto:Geis.Stacey@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>; Oquendo, Ana (she/her/hers) <[Oquendo.Ana@epa.gov](mailto:Oquendo.Ana@epa.gov)>; Freeman, Caroline <[Freeman.Caroline@epa.gov](mailto:Freeman.Caroline@epa.gov)>; Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Hoang, Anhthu <[Hoang.Anhthu@epa.gov](mailto:Hoang.Anhthu@epa.gov)>; Vong, Suong <[Vong.Suong@epa.gov](mailto:Vong.Suong@epa.gov)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Lassiter, Penny <[Lassiter.Penny@epa.gov](mailto:Lassiter.Penny@epa.gov)>  
**Cc:** [gina@floridarising.org](mailto:gina@floridarising.org); Kelli Thomas <[kelli@floridarising.org](mailto:kelli@floridarising.org)>; MacKenzie Marcelin <[mackenzie@floridarising.org](mailto:mackenzie@floridarising.org)>; [sebastian@floridarising.org](mailto:sebastian@floridarising.org); Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>; [jjsmith@earthjustice.org](mailto:jjsmith@earthjustice.org)  
**Subject:** Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Good Afternoon,

We are writing to bring to your attention a massive fire that broke out yesterday at a municipal waste incinerator in a residential community in Doral, FL: the Miami-Dade County Resources Recovery Facility (address: 6990 NW 97th Avenue, Doral, FL 33178).

EPA maintains oversight of this facility under the Clean Air Act. The fire began around 2 p.m. yesterday, and though it has been contained somewhat, **it is ongoing, and it is expected that it will take days for firefighters to out the fire.** The apparent cause is that waste on a conveyor belt caught on fire.

Here is news coverage of the incident.

- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272447693.html>
- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272457138.html>
- <https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/>
- <https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/>
-  [processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4](#)
-  [processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4](#)
-  [original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4](#)

As you may be aware, Florida Rising has been opposed to this polluting waste incinerator in a residential community, calling for denial of the Title V air permit renewal via written comments and filing a civil rights complaint to EPA's Office of Civil Rights.

Now, community members in this environmental justice community face even more toxic exposure to air pollution from the billowing smoke from this fire, as they are forced to remain indoors and essentially protect themselves from this hazard. As part of its waste burning, this incinerator normally burns plastic and tires, and it is not prohibited from burning medical waste; as a result, the community is naturally fearful of what toxins they are now being exposed to from this fire.

**We are calling on EPA to act under its enforcement authority and its mandate to protect human health from these types of toxic exposures to:**

- 1) **Assist with immediately safeguarding the health of residents near this fire,** including evacuations and the shutting down of schools;
- 2) **Conduct a prompt, full, and independent investigation** into the cause of this fire, making the investigation results available to the public; and
- 3) **Order the facility operator, Covanta Energy, to cease operations at this source** indefinitely, and at least until the conclusion of an independent investigation and the determination by EPA that it is safe to resume operations at this facility.

Waste incinerators emit a host of toxic pollution that is harmful to people's health, and in Doral, in Florida, and in the United States, these facilities are predominantly in Black and brown communities. We are calling on EPA to act now, while also facilitating the shutdown of these harmful facilities in favor of safer, and more sustainable waste management alternatives, such as the ones outlined in your agency's Zero Waste Toolkit.

Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt  
Senior Attorney

Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
[www.earthjustice.org](http://www.earthjustice.org)



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Message

---

**From:** Jenkins, Brandi [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9B3EA7AACD1A44C0AB3EE9A8F0A2EA3F-JENKINS, BRANDI]  
**Sent:** 2/13/2023 6:47:49 PM  
**To:** Marraccini, Davina [Marraccini.Davina@epa.gov]; Lamberth, Larry [Lamberth.Larry@epa.gov]; Keefer, David [Keefer.David@epa.gov]; Wise, Allison [Wise.Allison@epa.gov]; Pinkney, James [Pinkney.James@epa.gov]; Wilborn, Janay [Wilborn.Janay@epa.gov]  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Yes. We have deployed an OSC and contractor support.

---

**From:** Marraccini, Davina <Marraccini.Davina@epa.gov>  
**Sent:** Monday, February 13, 2023 12:51 PM  
**To:** Lamberth, Larry <Lamberth.Larry@epa.gov>; Keefer, David <Keefer.David@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>; Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>; Wilborn, Janay <Wilborn.Janay@epa.gov>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

+ Brandi, James (Acting PGAS Section Chief) and JaNay (Govt liaison for FL) for awareness.

Does anyone know whether the state has requested EPA assistance?

---

**From:** Lamberth, Larry <Lamberth.Larry@epa.gov>  
**Sent:** Monday, February 13, 2023 12:48 PM  
**To:** Keefer, David <Keefer.David@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>; Marraccini, Davina <Marraccini.Davina@epa.gov>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Who's running point for you all ?

Thanks.

Larry

Larry L. Lamberth  
Deputy Director  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency  
14<sup>th</sup> Floor Sam Nunn Federal Center  
61 Forsyth Street  
Atlanta, Georgia 30303

Telephone: 404-562-8590  
Cell: 404-769-5583  
Fax: 404-562-8566

---

**From:** Kemker, Carol <Kemker.Carol@epa.gov>  
**Sent:** Monday, February 13, 2023 12:13 PM  
**To:** Lamberth, Larry <Lamberth.Larry@epa.gov>

**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

**Importance:** High

Can you coordinate with SEMD on how to respond (or not) to this request?

---

**From:** Dominique Burkhardt <[dburkhardt@earthjustice.org](mailto:dburkhardt@earthjustice.org)>

**Sent:** Monday, February 13, 2023 12:07 PM

**To:** Geis, Stacey <[Geis.Stacey@epa.gov](mailto:Geis.Stacey@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>; Oquendo, Ana (she/her/hers) <[Oquendo.Ana@epa.gov](mailto:Oquendo.Ana@epa.gov)>; Freeman, Caroline <[Freeman.Caroline@epa.gov](mailto:Freeman.Caroline@epa.gov)>; Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Hoang, Anhthu <[Hoang.Anhthu@epa.gov](mailto:Hoang.Anhthu@epa.gov)>; Vong, Suong <[Vong.Suong@epa.gov](mailto:Vong.Suong@epa.gov)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Lassiter, Penny <[Lassiter.Penny@epa.gov](mailto:Lassiter.Penny@epa.gov)>

**Cc:** [gina@floridarising.org](mailto:gina@floridarising.org); Kelli Thomas <[kelli@floridarising.org](mailto:kelli@floridarising.org)>; MacKenzie Marcelin <[mackenzie@floridarising.org](mailto:mackenzie@floridarising.org)>; [sebastian@floridarising.org](mailto:sebastian@floridarising.org); Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>; [jjsmith@earthjustice.org](mailto:jjsmith@earthjustice.org)

**Subject:** Urgent Response Needed Re. Fire at EPA-Regulated Incinerator




**Importance:** High

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- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272457138.html>
- <https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/>
- <https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/>
-  [processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4](#)
-  [processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4](#)
-  [original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4](#)

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**We are calling on EPA to act under its enforcement authority and its mandate to protect human health from these types of toxic exposures to:**

- 1) **Assist with immediately safeguarding the health of residents near this fire**, including evacuations and the shutting down of schools;
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Sincerely,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
[www.earthjustice.org](http://www.earthjustice.org)



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Message

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**Sent:** 2/13/2023 7:01:24 PM  
**To:** Lamberth, Larry [Lamberth.Larry@epa.gov]; Marraccini, Davina [Marraccini.Davina@epa.gov]; Keefer, David [Keefer.David@epa.gov]; Wise, Allison [Wise.Allison@epa.gov]; Pinkney, James [Pinkney.James@epa.gov]; Wilborn, Janay [Wilborn.Janay@epa.gov]  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

If I had scrolled all the way down, I would've seen the full incoming. Well, yes, we will handle the response.

Thanks!

Brandi

---

**From:** Lamberth, Larry <Lamberth.Larry@epa.gov>  
**Sent:** Monday, February 13, 2023 2:00 PM  
**To:** Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Marraccini, Davina <Marraccini.Davina@epa.gov>; Keefer, David <Keefer.David@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>; Wilborn, Janay <Wilborn.Janay@epa.gov>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Thanks. I assume you all are handling the response below? This was forwarded to us from OECA.

Thanks.

Larry

Larry L. Lamberth  
Deputy Director  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency  
14<sup>th</sup> Floor Sam Nunn Federal Center  
61 Forsyth Street  
Atlanta, Georgia 30303

Telephone: 404-562-8590  
Cell: 404-769-5583  
Fax: 404-562-8566

---

**From:** Jenkins, Brandi <Jenkins.Brandi@epa.gov>  
**Sent:** Monday, February 13, 2023 1:48 PM  
**To:** Marraccini, Davina <Marraccini.Davina@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>; Keefer, David <Keefer.David@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>; Wilborn, Janay <Wilborn.Janay@epa.gov>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Yes. We have deployed an OSC and contractor support.

---

**From:** Marraccini, Davina <Marraccini.Davina@epa.gov>  
**Sent:** Monday, February 13, 2023 12:51 PM

**To:** Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>; Keefer, David <[Keefer.David@epa.gov](mailto:Keefer.David@epa.gov)>; Wise, Allison <[Wise.Allison@epa.gov](mailto:Wise.Allison@epa.gov)>; Jenkins, Brandi <[Jenkins.Brandi@epa.gov](mailto:Jenkins.Brandi@epa.gov)>; Pinkney, James <[Pinkney.James@epa.gov](mailto:Pinkney.James@epa.gov)>; Wilborn, Janay <[Wilborn.Janay@epa.gov](mailto:Wilborn.Janay@epa.gov)>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

+ Brandi, James (Acting PGAS Section Chief) and JaNay (Govt liaison for FL) for awareness.

Does anyone know whether the state has requested EPA assistance?

---

**From:** Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>  
**Sent:** Monday, February 13, 2023 12:48 PM  
**To:** Keefer, David <[Keefer.David@epa.gov](mailto:Keefer.David@epa.gov)>; Wise, Allison <[Wise.Allison@epa.gov](mailto:Wise.Allison@epa.gov)>; Marraccini, Davina <[Marraccini.Davina@epa.gov](mailto:Marraccini.Davina@epa.gov)>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Who's running point for you all ?

Thanks.

Larry

Larry L. Lamberth  
Deputy Director  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency  
14<sup>th</sup> Floor Sam Nunn Federal Center  
61 Forsyth Street  
Atlanta, Georgia 30303

Telephone: 404-562-8590  
Cell: 404-769-5583  
Fax: 404-562-8566

---

**From:** Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>  
**Sent:** Monday, February 13, 2023 12:13 PM  
**To:** Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Can you coordinate with SEMD on how to respond (or not) to this request?

---

**From:** Dominique Burkhardt <[dburkhardt@earthjustice.org](mailto:dburkhardt@earthjustice.org)>  
**Sent:** Monday, February 13, 2023 12:07 PM  
**To:** Geis, Stacey <[Geis.Stacey@epa.gov](mailto:Geis.Stacey@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>; Oquendo, Ana (she/her/hers) <[Oquendo.Ana@epa.gov](mailto:Oquendo.Ana@epa.gov)>; Freeman, Caroline <[Freeman.Caroline@epa.gov](mailto:Freeman.Caroline@epa.gov)>; Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Hoang, Anhthu <[Hoang.Anhthu@epa.gov](mailto:Hoang.Anhthu@epa.gov)>; Vong, Suong <[Vong.Suong@epa.gov](mailto:Vong.Suong@epa.gov)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Lassiter, Penny <[Lassiter.Penny@epa.gov](mailto:Lassiter.Penny@epa.gov)>  
**Cc:** gina@floridarising.org; Kelli Thomas <[kelli@floridarising.org](mailto:kelli@floridarising.org)>; MacKenzie Marcelin <[mackenzie@floridarising.org](mailto:mackenzie@floridarising.org)>; sebastian@floridarising.org; Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>; jsmith@earthjustice.org

**Subject:** Urgent Response Needed Re. Fire at EPA-Regulated Incinerator




**Importance:** High

Good Afternoon,

We are writing to bring to your attention a massive fire that broke out yesterday at a municipal waste incinerator in a residential community in Doral, FL: the Miami-Dade County Resources Recovery Facility (address: 6990 NW 97th Avenue, Doral, FL 33178).

EPA maintains oversight of this facility under the Clean Air Act. The fire began around 2 p.m. yesterday, and though it has been contained somewhat, **it is ongoing, and it is expected that it will take days for firefighters to out the fire.** The apparent cause is that waste on a conveyor belt caught on fire.

Here is news coverage of the incident.

- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272447693.html>
- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272457138.html>
- <https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/>
- <https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/>
-  [processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4](#)
-  [processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4](#)
-  [original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4](#)

As you may be aware, Florida Rising has been opposed to this polluting waste incinerator in a residential community, calling for denial of the Title V air permit renewal via written comments and filing a civil rights complaint to EPA's Office of Civil Rights.

Now, community members in this environmental justice community face even more toxic exposure to air pollution from the billowing smoke from this fire, as they are forced to remain indoors and essentially protect themselves from this hazard. As part of its waste burning, this incinerator normally burns plastic and tires, and it is not prohibited from burning medical waste; as a result, the community is naturally fearful of what toxins they are now being exposed to from this fire.

**We are calling on EPA to act under its enforcement authority and its mandate to protect human health from these types of toxic exposures to:**

- 1) **Assist with immediately safeguarding the health of residents near this fire,** including evacuations and the shutting down of schools;
- 2) **Conduct a prompt, full, and independent investigation** into the cause of this fire, making the investigation results available to the public; and
- 3) **Order the facility operator, Covanta Energy, to cease operations at this source** indefinitely, and at least until the conclusion of an independent investigation and the determination by EPA that it is safe to resume operations at this facility.

Waste incinerators emit a host of toxic pollution that is harmful to people's health, and in Doral, in Florida, and in the United States, these facilities are predominantly in Black and brown communities. We are calling on EPA to act now, while also facilitating the shutdown of these harmful facilities in favor of safer, and more sustainable waste management alternatives, such as the ones outlined in your agency's Zero Waste Toolkit.

Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
[www.earthjustice.org](http://www.earthjustice.org)



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Message

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**From:** Jenkins, Brandi [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9B3EA7AACD1A44C0AB3EE9A8F0A2EA3F-JENKINS, BRANDI]  
**Sent:** 2/17/2023 8:52:18 PM  
**To:** Keefer, David [Keefer.David@epa.gov]  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Thanks. Can they keep me in the loop?

---

**From:** Keefer, David <Keefer.David@epa.gov>  
**Sent:** Friday, February 17, 2023 3:44 PM  
**To:** Jenkins, Brandi <Jenkins.Brandi@epa.gov>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

FYI, Earthjustice is requesting an enforcement action at Miami-Dade, ECAD is lead for R4 response.

---

**From:** Keefer, David  
**Sent:** Friday, February 17, 2023 3:42 PM  
**To:** Lamberth, Larry <Lamberth.Larry@epa.gov>; Rubini, Suzanne <Rubini.Suzanne@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>  
**Cc:** Hansen, Susan <Hansen.Susan@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Bingham, Kimberly <Bingham.Kimberly@epa.gov>; Chavez, Araceli <Chavez.Araceli@epa.gov>; Russo, Todd <Russo.Todd@epa.gov>; Chaffins, Randall <Chaffins.Randall@epa.gov>; Webster, James <Webster.James@epa.gov>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Everyone:

This is the latest update:

**NRC 1359872, Doral Florida Facility Fire, Doral, Dade County, Florida** - On 02/13, A City-owned, contractor-operated solid waste energy reclamation facility reportedly caught fire at one of the conveyor belt assemblies. The fire spread to three separate metal skinned buildings at the facility. Fire suppression was limited to defensive actions through the night. It is believed that the hazardous materials present at the facility were not involved in the fire at the early stages. An EPA R4 FOSC and Superfund Technical Assessment and Response Team (START) contractors mobilized with air monitoring and air sampling equipment to assist in a determination of what hazardous constituents are in the noxious smoke and may be affecting community health. EPA assets arrived on-site and integrated into Unified Command on 2/14. The fire still burns and heavy equipment mobilized to assist with suppression operations. Firefighting water is believed to be contained. Miami-Dade County Division of Environmental Resources Management (DERM) conducted runoff water sampling. EPA established air monitoring stations consisting of particulate monitors and toxic chemical monitors (carbon monoxide, hydrogen sulfide, volatile organic compounds (VOC). EPA also established air sampling stations consisting of total VOC, total polycyclic aromatic hydrocarbons (PAHs), asbestos, and Resource Conservation and Recovery Act (RCRA) metals samplers. An additional FOSC mobilized to assist with the operations. An EPA Environmental Justice Standard Report was generated and provided to the FOSC for use by Unified Command as needed. Demolition and fire extinguishment operations continue. Smoke is still impacting the surrounding communities. All EPA generated air monitoring data was provided to Unified Command (UC). UC is working on a communication plan and will issue the data summaries to the public. Air sampling data will be provided to UC once the results are received from the analytical laboratory. One FOSC is demobilizing today. The second FOSC will demobilize once the PRP industrial hygiene contractors are integrated into the air monitoring and air sampling operations.

**Update:** Significant process has been made on building demolition permitting access to the seat of the fire. EPA air monitoring and sampling operations continue. The industrial hygiene firm hired by the PRP arrived on-site early in the

morning on 2/17. EPA participated in a press briefing and the City of Doral continued to recommend that residents impacted by the smoke stay indoors with windows closed (shelter-in-place).

Following is a narrative/talking points about the response:

#### **BACKGROUND:**

- On February 13, 2023, a City-owned, solid waste energy reclamation facility, operated by Covanta Holdings Corporation, caught fire at one of the conveyor belt assemblies.
- The fire spread to three separate buildings at the facility.
- Local Emergency Management Officials did not issue any evacuation orders.
- Responding to a request from Miami-Dade County, the U.S. Environmental Protection Agency mobilized an EPA Federal On-Scene Coordinator (FOSC) with contractor support to initiate air monitoring and air sampling operations.
- The EPA established air monitoring stations consisting of particulate monitors and toxic chemical monitors (carbon monoxide, hydrogen sulfide, volatile organic compounds (VOC)). The EPA also established air sampling stations consisting of total VOC, total polycyclic aromatic hydrocarbons (PAHs), and Resource Conservation and Recovery Act (RCRA) metals samplers.
- An additional FOSC mobilized to assist with air monitoring operations on February 14, 2023.
- Demolition and firefighting operations continue as of February 15, 2023; however, smoke continues to emanate from the burning facility.
- EPA continues air sample and air monitoring operations. One round of VOC samples and three rounds of PAH and RCRA metals samples have been collected to date.
- As of 02/15/2023, the fire is currently within a partially collapsed structure. Due to safety concerns no one is able to enter the building where the fire remains. Demolition of the partially collapsed structure has begun. Once demolition completed, final fighting activities can begin.

#### **KEY POINTS:**

- EPA operations at this time consists of air monitoring and sampling operations and provision of technical assistance and coordination with Miami-Dade County.
- There have been PM 2.5 exceedances which fall under the Unhealthy classification based on PM 2.5 Community Action Thresholds. Summary tables have been provided to ATSDR for review and provided to Unified Command. There have been low-level detections of VOCs, CO, and CL but nothing above action levels.
- Air sampling results (lab analysis) are pending.

---

**From:** Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>

**Sent:** Friday, February 17, 2023 3:02 PM

**To:** Rubini, Suzanne <[Rubini.Suzanne@epa.gov](mailto:Rubini.Suzanne@epa.gov)>; Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Newman, Keriema <[Newman.Keriema@epa.gov](mailto:Newman.Keriema@epa.gov)>

**Cc:** Hansen, Susan <[Hansen.Susan@epa.gov](mailto:Hansen.Susan@epa.gov)>; Palmer, Leif <[Palmer.Leif@epa.gov](mailto:Palmer.Leif@epa.gov)>; Keefer, David <[Keefer.David@epa.gov](mailto:Keefer.David@epa.gov)>; Bingham, Kimberly <[Bingham.Kimberly@epa.gov](mailto:Bingham.Kimberly@epa.gov)>; Chavez, Araceli <[Chavez.Araceli@epa.gov](mailto:Chavez.Araceli@epa.gov)>; Russo, Todd <[Russo.Todd@epa.gov](mailto:Russo.Todd@epa.gov)>

**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Likely. We need to come up to speed quickly, so I am copying our team as well as David.

Larry L. Lamberth  
Deputy Director  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency  
14<sup>th</sup> Floor Sam Nunn Federal Center

61 Forsyth Street  
Atlanta, Georgia 30303

Telephone: 404-562-8590  
Cell: 404-769-5583  
Fax: 404-562-8566

---

**From:** Rubini, Suzanne <[Rubini.Suzanne@epa.gov](mailto:Rubini.Suzanne@epa.gov)>  
**Sent:** Friday, February 17, 2023 2:57 PM  
**To:** Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>; Newman, Keriema <[Newman.Keriema@epa.gov](mailto:Newman.Keriema@epa.gov)>  
**Cc:** Hansen, Susan <[Hansen.Susan@epa.gov](mailto:Hansen.Susan@epa.gov)>; Palmer, Leif <[Palmer.Leif@epa.gov](mailto:Palmer.Leif@epa.gov)>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

FYI – I think I response would need to come from ECAD.

---

**From:** Dominique Burkhardt <[dburkhardt@earthjustice.org](mailto:dburkhardt@earthjustice.org)>  
**Sent:** Friday, February 17, 2023 2:54 PM  
**To:** Palmer, Leif <[Palmer.Leif@epa.gov](mailto:Palmer.Leif@epa.gov)>; Rubini, Suzanne <[Rubini.Suzanne@epa.gov](mailto:Rubini.Suzanne@epa.gov)>; Hansen, Susan <[Hansen.Susan@epa.gov](mailto:Hansen.Susan@epa.gov)>  
**Cc:** Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Good Afternoon Mr. Palmer, Ms. Rubini, and Ms. Hansen:

I just left a voicemail for Mr. Palmer regarding the waste incinerator that has been on fire in Miami (Doral) since Sunday, in a residential community. Please see below our attempts at having EPA initiate an investigation into the cause of the fire – including any legal or permit violations – as soon as possible.

Thank you for your prompt attention to this matter,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
[www.earthjustice.org](http://www.earthjustice.org)



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---

**From:** Dominique Burkhardt  
**Sent:** Friday, February 17, 2023 2:40 PM  
**To:** [nowell.valerie@epa.gov](mailto:nowell.valerie@epa.gov)

**Cc:** [wilson.saundi@epa.gov](mailto:wilson.saundi@epa.gov); Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>

**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

**Importance:** High

Good Afternoon Ms. Nowell,

I am writing to bring to your attention a massive fire that broke out at a waste incinerator in Doral, Florida, that has been burning since Sunday. EPA is on site conducting air monitoring, and the readings are showing dangerous spikes in air quality that are harmful to people's health. Five days after the outbreak of this fire, people are still being ordered to remain indoors for their safety.

We are appreciative of EPA's immediate action to monitor the air quality; however, it is just as important that **an independent investigation** be carried out into the cause of this fire, so that any hazards or potential permit or legal violations can immediately be accounted for and addressed – and to prevent this type of hazard from endangering another community.

EPA's Office of Civil Rights had been aware of this incinerator because Earthjustice filed a civil rights complaint last March regarding this and other incinerators in the state. In the email below, ECRCO advised they were looking into the situation. We are writing to ask if an independent investigation can be carried out by R4, either independently or alongside other EPA divisions, such as ECRCO.

Thank you for your attention to this matter,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
[www.earthjustice.org](http://www.earthjustice.org)



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---

**From:** Vong, Suong <[Vong.Suong@epa.gov](mailto:Vong.Suong@epa.gov)>

**Sent:** Tuesday, February 14, 2023 2:15 PM

**To:** Dominique Burkhardt <[dburkhardt@earthjustice.org](mailto:dburkhardt@earthjustice.org)>

**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

**This message originated outside of Earthjustice. Please use caution before opening attachments or links.**

Thank you, Dominique, for bringing this matter to our attention. We are evaluating our options on this issue.

Suong Vong  
Team Lead, Office of External Civil Rights Compliance

Office of Environmental Justice and External Civil Rights  
U.S. Environmental Protection Agency  
Email: [vong.suong@epa.gov](mailto:vong.suong@epa.gov)  
Phone: (202) 564-0392

---

**From:** Dominique Burkhardt <[dburkhardt@earthjustice.org](mailto:dburkhardt@earthjustice.org)>

**Sent:** Monday, February 13, 2023 12:07 PM

**To:** Geis, Stacey <[Geis.Stacey@epa.gov](mailto:Geis.Stacey@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>; Oquendo, Ana (she/her/hers) <[Oquendo.Ana@epa.gov](mailto:Oquendo.Ana@epa.gov)>; Freeman, Caroline <[Freeman.Caroline@epa.gov](mailto:Freeman.Caroline@epa.gov)>; Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Hoang, Anhthu <[Hoang.Anhthu@epa.gov](mailto:Hoang.Anhthu@epa.gov)>; Vong, Suong <[Vong.Suong@epa.gov](mailto:Vong.Suong@epa.gov)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Lassiter, Penny <[Lassiter.Penny@epa.gov](mailto:Lassiter.Penny@epa.gov)>

**Cc:** gina@floridarising.org; Kelli Thomas <[kelli@floridarising.org](mailto:kelli@floridarising.org)>; MacKenzie Marcelin <[mackenzie@floridarising.org](mailto:mackenzie@floridarising.org)>; sebastian@floridarising.org; Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>; jsmith@earthjustice.org

**Subject:** Urgent Response Needed Re. Fire at EPA-Regulated Incinerator




**Importance:** High

Good Afternoon,

We are writing to bring to your attention a massive fire that broke out yesterday at a municipal waste incinerator in a residential community in Doral, FL: the Miami-Dade County Resources Recovery Facility (address: 6990 NW 97th Avenue, Doral, FL 33178).

EPA maintains oversight of this facility under the Clean Air Act. The fire began around 2 p.m. yesterday, and though it has been contained somewhat, **it is ongoing, and it is expected that it will take days for firefighters to out the fire**. The apparent cause is that waste on a conveyor belt caught on fire.

Here is news coverage of the incident.

- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272447693.html>
- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272457138.html>
- <https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/>
- <https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/>
-  [processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4](#)
-  [processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4](#)
-  [original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4](#)

As you may be aware, Florida Rising has been opposed to this polluting waste incinerator in a residential community, calling for denial of the Title V air permit renewal via written comments and filing a civil rights complaint to EPA's Office of Civil Rights.

Now, community members in this environmental justice community face even more toxic exposure to air pollution from the billowing smoke from this fire, as they are forced to remain indoors and essentially protect themselves from this hazard. As part of its waste burning, this incinerator normally burns plastic and tires, and it is not prohibited from burning medical waste; as a result, the community is naturally fearful of what toxins they are now being exposed to from this fire.

We are calling on EPA to act under its enforcement authority and its mandate to protect human health from these types of toxic exposures to:

- 1) **Assist with immediately safeguarding the health of residents near this fire**, including evacuations and the shutting down of schools;
- 2) **Conduct a prompt, full, and independent investigation** into the cause of this fire, making the investigation results available to the public; and
- 3) **Order the facility operator, Covanta Energy, to cease operations at this source** indefinitely, and at least until the conclusion of an independent investigation and the determination by EPA that it is safe to resume operations at this facility.

Waste incinerators emit a host of toxic pollution that is harmful to people's health, and in Doral, in Florida, and in the United States, these facilities are predominantly in Black and brown communities. We are calling on EPA to act now, while also facilitating the shutdown of these harmful facilities in favor of safer, and more sustainable waste management alternatives, such as the ones outlined in your agency's Zero Waste Toolkit.

Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
[www.earthjustice.org](http://www.earthjustice.org)



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UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

SAVE THE MANATEE CLUB,  
CENTER FOR BIOLOGICAL  
DIVERSITY, and DEFENDERS OF  
WILDLIFE,

Plaintiffs,

V.

UNITED STATES  
ENVIRONMENTAL PROTECTION  
AGENCY,

Defendant.

Case No. \_\_\_\_\_

# COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

## INTRODUCTION

1. This case challenges the failure of the U.S. Environmental Protection Agency (“EPA”) to reinitiate Endangered Species Act (“ESA”) section 7 consultation with the U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”) (together, the “Services”) on water quality standards for Florida’s Indian River Lagoon, where poor water quality has caused catastrophic mortality of Florida manatees.

2. The Indian River Lagoon (the “Lagoon”) is one of the most biologically diverse estuaries in North America. Its seagrass ecosystem is home to thousands of plant and animal species. Sometimes called the “cradle of the ocean,” the Lagoon features brackish waters that some predators avoid, leading young sea turtles, fish, crab, and shrimp to spend their juvenile stages there before they mature and move into the Atlantic Ocean. The iconic Florida manatee inhabits the Lagoon, alongside green sea turtles, loggerhead sea turtles, and smalltooth sawfish. The manatee and sea turtles are protected as “threatened” species under the ESA. The smalltooth sawfish is protected as an “endangered” species under the ESA.

3. The Indian River Lagoon is currently suffering ecologic collapse. More than a thousand manatees died in Florida in 2021, more than any other year on record, with more than half of the deaths occurring in the Lagoon. Manatee deaths in the Lagoon have continued into 2022 at a record pace.

4. The root of the problem is deteriorating water quality. Excess nitrogen and phosphorus pollution from human activities fuels harmful algal outbreaks that block sunlight from reaching seagrass, the manatee's main food source. As a result, tens of thousands of acres of seagrass have died, and hundreds of manatees have starved to death. Other ESA-listed species in the Lagoon are also harmed by the same pollution. Sea turtles develop deadly tumors in the dirty water, and smalltooth sawfish lose their mangrove habitat.

5. Congress passed the Clean Water Act ("CWA") and the ESA to prevent such harms.

6. The CWA charges the Florida Department of Environmental Protection ("FDEP") and EPA with the protection of Florida's waterbodies, including the beleaguered Indian River Lagoon. Pursuant to its CWA duty, FDEP has set pollution budgets known as "total maximum daily loads" ("TMDLs") for each pollutant impairing a waterbody. FDEP set TMDLs for nitrogen and phosphorus in the Indian River Lagoon in 2009 with a goal of preserving the natural balance of flora and fauna in the Lagoon, including maintaining seagrass. EPA approved FDEP's 2009 TMDLs as water quality standards for the Lagoon in 2013.

7. At the time EPA approved these TMDLs as water quality standards, it consulted with FWS and NMFS under section 7 of the ESA. The ESA consultation

process exists to ensure that EPA's actions—including its approval of a state's water quality standards—are not likely to jeopardize the survival and recovery of listed species or destroy or adversely modify designated critical habitat. Following consultation, FWS concurred in EPA's determination that the water quality standards would not likely adversely affect manatees. NMFS determined that the water quality standards would not jeopardize green sea turtles, loggerhead sea turtles, or smalltooth sawfish.

8. The ESA also requires that consultation be reinitiated in certain circumstances when new information reveals effects of an action on listed species or critical habitat that were not previously considered.

9. On August 10, 2021, FWS asked EPA to reinitiate consultation based on new information that harmful algal outbreaks have killed tens of thousands of acres of seagrass, leading manatees to starve to death in record numbers.

10. EPA refused to reinitiate consultation in response to FWS's request.

11. Plaintiffs Save the Manatee Club, Center for Biological Diversity, and Defenders of Wildlife notified the EPA, FWS, and NMFS of their intent to sue over EPA's failure to reinitiate consultation in violation of ESA section 7. Like FWS, Plaintiffs explained that new information shows that the mass die-off of manatees and harm to other protected species in the Indian River Lagoon is caused by nitrogen and phosphorus pollution subject to the 2009 TMDLs. Plaintiffs also

explained that new information shows that the TMDLs are not adequately followed or enforced, nor are there reasonable assurances that the state will meet the TMDLs in the absence of additional enforcement measures. Finally, Plaintiffs explained that new information demonstrates that the TMDLs fail to account for contributions from historic pollution sources, underestimate contributions from septic systems, and do not account for the impacts of climate change.

12. EPA did not reinitiate consultation in response to Plaintiffs' notice.

13. Manatees and other ESA-protected species in the Indian River Lagoon are suffering and will continue to suffer until water quality in the Lagoon improves. Plaintiffs therefore ask this Court to compel EPA to reinitiate consultation with the Services to protect ESA-listed species that depend on the Lagoon's fragile habitat, as the Endangered Species Act requires.

### **JURISDICTION AND VENUE**

14. Plaintiffs bring this action pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), which waives EPA's sovereign immunity. Pursuant to this provision, Plaintiffs sent EPA and the Services two 60-day notice letters of their intent to sue for all ESA violations listed herein. *See id.* § 1540(g)(2)(A)(i). Plaintiffs sent the first notice letter—regarding consultation with FWS on impacts to manatees—on December 20, 2021, and the second letter—regarding consultation with NMFS on impacts to green sea turtles, loggerhead sea turtles,

and smalltooth sawfish—on February 7, 2022. [Attached as Exhibits 1 and 2]. EPA has not remedied the legal violations Plaintiffs identified in the 60-day notice letters and now allege in this Complaint.

15. This Court has jurisdiction over Plaintiffs’ claims under 16 U.S.C. § 1540(g) and 28 U.S.C. § 1331 (federal question) and may issue a declaratory judgment and injunctive relief under 28 U.S.C. §§ 2201–02.

16. Venue lies in the Middle District of Florida pursuant to 28 U.S.C. § 1391(e)(1)(B) & (C), because a substantial part of the Indian River Lagoon and the species at issue occur in this District, and because Plaintiff Save the Manatee Club’s office is in Maitland, Orange County, in this District. For these reasons, venue is further appropriate in the Orlando Division of the Middle District of Florida as this action is most directly connected with, and most conveniently advanced, in the Orlando Division. *See* Middle District of Florida Local Rule 1.04(a)–(b).

## **PARTIES**

17. Plaintiff Save the Manatee Club is a nonprofit 501(c)(3) membership organization dedicated to the conservation of manatees. The organization was founded in 1981 by singer and songwriter Jimmy Buffett and Governor of Florida Bob Graham. Save the Manatee Club is located in Maitland, Florida. The organization currently has about 40,000 active members.

18. Save the Manatee Club brings this action on behalf of itself and its members, many of whom enjoy observing, photographing, and appreciating the Florida manatee in its natural habitat. Save the Manatee Club members regularly engage in these activities in the Indian River Lagoon and will continue to do so in the future.

19. For example, one of Save the Manatee Club's members and volunteers lives, works, and recreates on or around the Indian River Lagoon. She has lived in Indian River County since 2011 and has been an active volunteer with Save the Manatee Club since 2012. This member has authored a book about manatee evolution, physiology, mythology, and conservation based on her observations and enjoyment of the animals in their Lagoon habitat. In addition to her volunteer work with Save the Manatee Club, this member gives educational talks on manatees to various environmental organizations and boating and garden clubs. One of her favorite activities is leading guided walks and kayak tours at Round Island, a well-known manatee observation area. During these tours, she shares her knowledge about and experiences with manatees, and discusses the animals' interesting lifestyle and biological quirks with members of the public.

20. Plaintiff Center for Biological Diversity (the "Center") is a nonprofit 501(c)(3) organization incorporated in the State of California with offices across the country, including in Washington, D.C., Arizona, California, Florida, New

York, North Carolina, Oregon, and Washington, and in Baja California Sur, Mexico. The Center works through science and environmental law to advocate for the protection of endangered, threatened, and rare species and their habitats both in the United States and abroad. The Center has over 81,800 active members, including members who reside in and travel to areas where manatees feed, breed, and migrate.

21. The Center brings this action on behalf of itself and its members, many of whom enjoy observing, photographing, and appreciating the Florida manatee and other species in their natural habitat in the Indian River Lagoon. The Center's members regularly engage in these activities in the Indian River Lagoon from land and water and will continue to do so in the future.

22. For example, one of the Center's members moved near the Indian River Lagoon in 1978 and became involved in manatee protection shortly thereafter. She has been advocating for manatees since high school and interned at the Marine Mammal Pathobiology Laboratory in Saint Petersburg, Florida, while pursuing her undergraduate degree. She also has a graduate degree in Coastal Resource Management and has provided data that informed the Florida Fish and Wildlife Conservation Commission's manatee protection plans. This member drives within sight distance of the Lagoon every week and kayaks on the Lagoon several times a year. She also stops at the manatee observation deck at Haulover

Canal every month and has concrete plans to do so again in May and June 2022. She considers manatees a wonderful cultural resource for the state of Florida that residents have the right to enjoy.

23. Plaintiff Defenders of Wildlife (“Defenders”) is a nonprofit 501(c)(3) membership organization dedicated to the protection and restoration of all native wild animals and plants in their natural communities and the preservation of the habitats on which these species depend. Headquartered in Washington, D.C., Defenders has regional and field offices in Alaska, Arizona, California, Colorado, Florida, Montana, New Mexico, North Carolina, Ohio, Oregon, Texas, Washington, and Wyoming. Defenders has nearly 2.2 million members and activists across the United States, including more than 124,000 members living in Florida where manatees live, feed, breed, and migrate.

24. Defenders brings this action on behalf of itself and its members, many of whom enjoy observing, photographing, and appreciating the Florida manatee and other species in their natural habitats. Defenders’ members regularly engage in these activities in various locations within Florida, including the Indian River Lagoon, from land and water and will continue to do so in the future.

25. For example, one of Defenders’ members enjoys viewing Florida manatees as often as she can. A key factor in her decision to live in Winter Park, Orange County, Florida, was that the city is near areas where she can regularly

view and enjoy manatees. She frequently enjoys visiting a manatee aggregation site in Blue Springs State Park in Orange City, Volusia County, Florida. This member also regularly visits the beach at Indialantic, a town between the Indian River Lagoon and the Atlantic Ocean, from which she can easily travel to the Indian River Lagoon to attempt to view manatees. This member has concrete plans to travel to the Indian River Lagoon to attempt to view manatees in May or June 2022. This member has also served as the Advocacy Committee Co-Chair of the Free the Ocklawaha River Coalition for Everyone, participated in the twice-yearly Manatee Forum meeting hosted by the Florida Fish and Wildlife Conservation Commission, and produced policy and outreach materials, comment letters, blog posts, and social media posts about manatees and the conservation challenges they face. Moreover, this member has engaged and will continue to engage in pro bono work to support manatee conservation.

26. Plaintiffs and their members are harmed by EPA's failure to reinstitute consultation with FWS and NMFS. This failure harms manatees, green sea turtles, loggerhead sea turtles, smalltooth sawfish, and other ESA-listed species that depend on the health of the ecosystem of the Indian River Lagoon, thereby decreasing Plaintiffs' members' opportunities to observe and enjoy them in their natural habitats.

27. An order from this Court declaring that EPA is in violation of the ESA and its implementing regulations, and directing EPA to reinitiate consultation with the Services, will remedy Plaintiffs' injuries. The ESA consultation process will help EPA protect and recover manatees, green sea turtles, smalltooth sawfish, and other ESA-protected species in the Indian River Lagoon where Plaintiffs' members observe and enjoy these species.

28. Defendant EPA is the federal agency charged with administering the Clean Water Act and ensuring that its actions under that statute do not jeopardize the survival and recovery of any ESA-listed species or destroy or adversely modify their critical habitat.

### **FACTUAL BACKGROUND**

29. The Indian River Lagoon is an estuary on Florida's Atlantic Coast that includes the Mosquito Lagoon, the Banana River Lagoon, and the Indian River. The ecology of the Lagoon is defined by seagrass, a grass-like flowering aquatic plant that provides habitat and forage for many commercially, recreationally, and ecologically important species. The Lagoon sustains species protected under the Endangered Species Act, including the Florida manatee (*Trichechus manatus latirostris*), green sea turtle (*Chelonia mydas*), loggerhead sea turtle (*Caretta caretta*), and smalltooth sawfish (*Pristis pectinate*).

30. As human development has increased around the Indian River Lagoon, so has the input of nitrogen and phosphorus from wastewater treatment discharges, leaking septic systems, and stormwater runoff and leachate of fertilizer and manure, among other sources. These nutrients, in turn, feed harmful algal outbreaks, which block light from getting to the seagrass, causing it to die.

31. As a result of the seagrass die-off, manatees in the Lagoon, which depend on the seagrass as their primary source of food, have been starving to death. More than 1,100 manatees died in 2021 in Florida—in total, 2021 saw a nearly 19% loss of the Atlantic coast population. Manatees are continuing to die at a record pace this year and continue to be particularly impacted by the seagrass loss in the Lagoon.

32. Other protected species in the Indian River Lagoon are also suffering from the impacts of water pollution. Water pollution in the Indian River Lagoon has been recently linked to the development of fibropapillomatosis in sea turtles, a chronic and often lethal tumor-causing disease. Water pollution also harms red mangroves, which provide nursery habitat for smalltooth sawfish.

33. The Lagoon is now at its ecological tipping point. If pollution is not curbed, the Lagoon will no longer be defined by its seagrass habitat, but by toxic or harmful algal outbreaks. Manatees, sea turtles, smalltooth sawfish, and other ESA-

protected species that depend on clean water in the Indian River Lagoon will continue to suffer and die.

## **LEGAL BACKGROUND**

### **I. The Clean Water Act**

34. Congress passed the CWA fifty years ago to prevent the type of ecological collapse currently occurring in the Indian River Lagoon. The aim of this statute is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve this goal, the CWA requires states to set water quality standards protective of public health and the environment. *Id.* § 1313(c).

35. Water quality standards consist of two elements. The first is a waterbody’s designated use—meaning the goals for the use of a particular waterbody. *See* 40 C.F.R. § 131.3(f), (i). For example, the highest surface water classification in Florida is Class I, for “potable water supplies,” while the lowest classification is Class V, for “navigation, utility and industrial use.” Fla. Admin. Code Ann. r. 62-302.400.

36. The second element of a water quality standard is the criteria, or qualities of a waterbody that, if met, will support a waterbody’s designated use. *See* 40 C.F.R. § 131.3(b), (i). Criteria can be expressed in numeric or narrative form. *Id.* § 131.3(b). For example, Class I waterbodies in Florida cannot exceed a

total arsenic concentration of 10 µg/L, while Class V waterbodies cannot exceed a total arsenic concentration of 50 µg/L (numeric standard). *See* Fla. Admin. Code Ann. r. 62-302.530(5)(a). By contrast, the standard for undissolved “oils and greases” for all classes of Florida waterbodies is narrative: none “shall be present so as to cause taste or odor, or otherwise interfere with the beneficial use of waters.” *Id.* § 62-302.530(50)(b).

37. Under the CWA, states also set pollution budgets, known as “total maximum daily loads” or “TMDLs,” for particularly polluted waterbodies. 33 U.S.C. § 1313(d)(1)(A), (d)(1)(C). States must establish TMDLs for each pollutant impairing a waterbody. *Id.* § 1313(d)(1)(C). TMDLs set a numeric target reflecting the maximum amount of the pollutant that a waterbody can receive and still comply with applicable water quality standards. 33 U.S.C. § 1313(d)(1)(C).

38. With the numeric target as a starting point, states then allocate that total pollutant load among the various sources that contribute the pollutant to the waterbody. There are two categories of contributors to the total pollutant load: (1) “point source” contributors—single identifiable sources, such as a discharge pipe from a sewage treatment plant, *see* 33 U.S.C. § 1362(14); and (2) “nonpoint source” contributors—pollution sources that do not originate from a single identifiable source, such as fertilizer runoff from farms. 40 C.F.R. § 130.2(g)–(i).

39. EPA oversees states' development of water quality standards and TMDLs. 33 U.S.C. § 1313(c)(3), (d)(2). Among other things, this means EPA may not approve or continue to authorize a TMDL or water quality standard that is inadequate. EPA's TMDL guidance explains that TMDL submittals should identify all "point and nonpoint sources of the pollutant of concern, including [the] location of the source(s) and the quantity of the loading" to enable EPA to adequately review the load and wasteload allocations. *See* EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 at 1, 4 (May 20, 2002). The TMDL must also include a "margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C). EPA is expected to closely scrutinize a TMDL and its component parts, including ensuring that the TMDL has a sufficiently protective margin of safety and that it provides "reasonable assurances" that point and nonpoint source control measures will achieve the expected load reductions. *See* EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 (May 20, 2002).

40. EPA has authority to revise water quality standards "in any case where the [EPA] Administrator determines that a revised or new standard is necessary to meet the requirements of [the CWA]." 33 U.S.C § 1313(c)(4)(B). EPA also has the authority to establish TMDLs itself, rather than waiting on the

state to do so, in the event EPA deems a state-submitted TMDL inadequate. 33 U.S.C. § 1313(d)(2). If a TMDL fails to attain water quality standards, “a TMDL revision is required.” EPA, Guidance for Water Quality-based Decisions: The TMDL Process 2 (April 1991).

## **II. The Endangered Species Act**

41. In 1973, recognizing that certain species “ha[d] been so depleted in numbers that they are in danger of or threatened with extinction,” Congress enacted the ESA, 16 U.S.C. §§ 1531–44, “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” *Id.* § 1531(a)(2), (b). Congress declared that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.” *Id.* § 1531(c)(1).

42. The ESA defines conservation as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.” *Id.* § 1532(3). The ESA’s goal is not simply to prevent endangered and threatened species from becoming extinct, but to recover these species to the point where they no longer require the statute’s protections.

43. Considered “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,” the ESA embodies the “plain intent” of Congress to “halt and reverse the trend toward species extinction, whatever the cost.” *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 180, 184 (1978); *see also id.* at 185 (ESA section 7’s legislative history “reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species” and “a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies”).

44. Section 7(a)(2) of the ESA imposes on federal agencies such as EPA a substantive duty to ensure that actions they authorize or carry out—including approval of a state’s water quality standards—are not likely to jeopardize listed species or destroy or adversely modify critical habitat designated for such species. 16 U.S.C. § 1536(a)(2); *see also* Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act, 66 Fed. Reg. 11,202 (Feb. 22, 2001) (“EPA & Services MOU”). Such “action agencies” must discharge this obligation in consultation with the appropriate expert fish and wildlife agency—FWS in the case of the manatee; NMFS in the case of green sea turtles, loggerhead sea turtles, and

smalltooth sawfish. *See id.*; 50 C.F.R. § 402.01(b); *id.* §§ 17.11(h), 223.102(e), 224.101(h).

45. The action agency’s ESA obligations do not end after completing an initial consultation. The ESA also requires that consultation be reinitiated in certain circumstances where “discretionary Federal involvement or control over the action has been retained or is authorized by law.” 50 C.F.R. § 402.16(a).

46. With regards to state water quality standards and TMDLs, EPA has continuing discretionary authority under 33 U.S.C. § 1313(c)(4)(B), which requires it to revise water quality standards “in any case where the [EPA] Administrator determines that a revised or new standard is necessary to meet the requirements of [the Clean Water Act],” and 33 U.S.C § 1313(d)(2) & (e)(2), which provides EPA with continuing discretionary authority over TMDLs. *See also* EPA & Services MOU at 11,206 (“EPA and the Services have agreed that where information indicates an existing standard is not adequate to avoid jeopardizing listed species, or destroying or adversely modifying designated critical habitat, EPA will work with the State/Tribe to obtain revisions in the standard or, if necessary, revise the standards through the promulgation of federal water quality standards under section 303(c)(4)(B) of the CWA.”).

47. Where the action agency retains discretionary involvement or control over its action, it must reinitiate consultation:

- (1) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or
- (4) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16(a).

### **PROCEDURAL HISTORY**

48. For decades, Florida's water quality standard for nutrients, including nitrogen and phosphorus, was a "narrative" criterion: "In no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna." Fla. Admin. Code Ann. r. 62-302.530(48)(b).

49. In 2008, environmental groups sued EPA, explaining that this vague narrative criterion was insufficient to protect Florida waters, and that "numeric" nutrient criteria were needed to control nitrogen and phosphorus pollution. The groups analogized the problem to highway speed limits. A numeric speed limit sign would read "Speed Limit 50 MPH" while a narrative speed limit sign would read "Don't Drive Too Fast." Nitrogen and phosphorus pollution in Florida could not be adequately controlled without specific numeric pollution limits in place.

50. Through a consent decree, EPA agreed to set revised standards. In 2010, EPA proposed and finalized rules establishing numeric nutrient criteria.

51. On June 13, 2012, Florida submitted its own revised water quality standards for EPA's approval under 33 U.S.C. § 1313(c) to supersede those adopted by EPA. Florida's revisions included a rule adopting a framework for developing numeric interpretations of the existing statewide narrative nutrient criterion.

52. The framework explains that where a site-specific TMDL has been adopted "that interpret[s] the narrative water quality criterion for nutrients," the TMDL shall be the numeric interpretation of the narrative nutrient criterion. Fla. Admin. Code Ann. r. 62-302.531.

53. For the Indian River Lagoon and its constituent Banana River Lagoon, FDEP set TMDLs for nitrogen and phosphorus in 2009 and submitted them for EPA's approval as numeric nutrient criteria. EPA approved these TMDLs as water quality standards in 2013. They are codified as "Estuary-Specific Numeric Interpretations of the Narrative Nutrient Criterion" under Fla. Admin. Code r. 62-302.532(aa) (referencing Fla. Admin. Code r. 62-304.520). In other words, while typically a TMDL is set in order to meet a water quality standard, here the water quality standards *are* the TMDLs for the Indian River Lagoon and the TMDLs *are* the water quality standards.

54. Under ESA section 7(a)(2), EPA consulted with FWS and NMFS on its approval of the Indian River Lagoon water quality standards/TMDLs in 2013.

55. In its informal consultation with the FWS, EPA concluded that its approval would not adversely affect Florida manatees. FWS concurred in that determination. In the biological opinion that NMFS issued to EPA following formal consultation on green sea turtles, loggerhead sea turtles, and smalltooth sawfish, NMFS concluded that EPA's approval would not likely jeopardize the continued existence of these species or destroy or adversely modify designated critical habitat for the smalltooth sawfish.

56. In March 2021, after more than 500 manatees had died since the beginning of the year, the Secretary of Commerce, in consultation with the Secretary of the Interior and with the guidance of the Working Group on Marine Mammal Unusual Mortality Events, officially declared an "Unusual Mortality Event" for the Atlantic Florida manatee under the Marine Mammal Protection Act, 16 U.S.C. § 1421c(a)(2)(B).

57. On August 10, 2021, FWS requested that EPA reinitiate ESA consultation. The letter explained that FWS "would like to make [EPA] aware of new information regarding an ongoing Unusual Mortality Event (UME) for manatees in the Indian River Lagoon (IRL) in Florida and recommend that EPA reinitiate consultation on the numeric nutrient criteria for water quality standards in

estuaries.” FWS’s letter alerted EPA that the Indian River Lagoon has reached an “ecological tipping point” and that the loss of “tens of thousands of acres of seagrass” due to excess nutrient pollution was causing the ongoing die-off of manatees.

58. On November 23, 2021, EPA responded by letter to FWS, declining to reinitiate consultation.

59. As required by the ESA citizen suit provision, 16 U.S.C. § 1540(g)(2)(A)(i), on December 20, 2021, Plaintiffs sent EPA and FWS a 60-day notice letter explaining that the agency is in violation of the Endangered Species Act for failing to reinitiate consultation with FWS. Plaintiffs sent EPA and NMFS a second 60-day notice letter on February 7, 2022, notifying EPA that it is in violation of the ESA for failing to reinitiate consultation with NMFS.

60. Plaintiffs’ letters pointed out new information that requires EPA to reinitiate consultation with the Services under 50 C.F.R. § 402.16(a)(2) on the water quality standards/TMDLs for the Indian River Lagoon.

61. First, like FWS’s request for reinitiation of consultation, Plaintiffs alerted EPA that the unprecedented die-off of manatees due to deteriorating water quality in the Lagoon requires reinitiation of consultation with FWS. Plaintiffs further explained to EPA how the same pollution adversely affecting manatees is also adversely affecting green sea turtles, loggerhead sea turtles, and smalltooth

sawfish, thus requiring reinitiation of consultation with NMFS. Plaintiffs explained that this new information, showing that continued deterioration of water quality is harming these species, calls into question the overall adequacy of the water quality standards/TMDLs.

62. Second, Plaintiffs explained that new information demonstrating lax enforcement and compliance for reductions of both point and nonpoint sources shows that the water quality standards/TMDLs lack reasonable assurances that point and nonpoint source reductions will achieve expected load reductions. Among other deficiencies, (1) the state of Florida has been routinely allowing harmful sewage spills as “wet weather discharges”; (2) the state is failing to inspect wastewater treatment facilities and fine them when they illegally pollute; and (3) the state is failing to ensure enrollment and oversight of a program aimed at curbing pollution from agricultural runoff.

63. Finally, Plaintiffs explained that new scientific information demonstrates that the water quality standards/TMDLs are insufficient at preventing seagrass loss because the models that underlie the TMDLs do not adequately account for all sources of pollution. In particular, (1) the models do not accurately account for ongoing inputs of nitrogen and phosphorus released from accumulated historic pollution in the Lagoon; (2) they underestimate nutrient loading from

septic tanks; and (3) they do not accurately account for the confounding role of climate change in driving nutrient loading.

64. To date, EPA has not reinitiated consultation with either FWS or NMFS.

**FIRST CLAIM FOR RELIEF  
(Failure to Reinitiate Consultation with FWS)**

65. Plaintiffs hereby reallege, as if fully set forth herein, each and every allegation contained in paragraphs 1 through 64.

66. EPA is required to reinitiate consultation with FWS on a given action when “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.” 50 C.F.R. § 402.16(a)(2).

67. New information reveals that EPA’s approval of FDEP’s water quality standards/TMDLs for the Indian River Lagoon has resulted in a manatee die-off without parallel in the ecosystem’s recorded history. New information also demonstrates that the water quality standards/TMDLs are inadequate because they lack reasonable assurances that reduced discharges from point and nonpoint sources will achieve expected reductions in the total pollutant load, and because they fail to account for historic pollution sources, contributions from septic systems, and the impacts of climate change. Collectively, these deficiencies have

allowed excess nitrogen and phosphorus pollution to enter the Lagoon, creating harmful algal outbreaks that kill the seagrass manatees need to survive.

68. By refusing to reinitiate consultation with FWS on the impacts of the water quality standards/TMDLs on Florida manatees, EPA is in violation of the ESA and its implementing regulations. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16(a)(2).

**SECOND CLAIM FOR RELIEF  
(Failure to Reinitiate Consultation with NMFS)**

69. Plaintiffs hereby reallege, as if fully set forth herein, each and every allegation contained in paragraphs 1 through 64.

70. EPA is required to reinitiate consultation with NMFS on a given action when “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.” 50 C.F.R. § 402.16(a)(2).

71. New information reveals that EPA’s approval of water quality standards/TMDLs for the Indian River Lagoon has had significant adverse effects on green and loggerhead sea turtles and smalltooth sawfish. These species and/or their habitats are harmed by the same excess nutrient pollution that threatens manatees, caused by the above-named deficiencies in the water quality standards/TMDLs for the Indian River Lagoon that EPA approved.

72. By failing to reinitiate consultation with NMFS on the impacts of the water quality standards/TMDLs on green and loggerhead sea turtles and smalltooth sawfish, EPA is in violation of the ESA and its implementing regulations. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16(a)(2).

### **REQUEST FOR RELIEF**

Therefore, Plaintiffs respectfully request that this Court:

73. Declare that EPA is in violation of the ESA for failing to reinitiate consultation with FWS on the effects of the water quality standards/TMDLs for the Indian River Lagoon on the Florida manatee and with NMFS on the effects of the water quality standards/TMDLs for the Indian River Lagoon on green and loggerhead sea turtles and smalltooth sawfish;

74. Order EPA to reinitiate ESA consultation with the Services on EPA's approval of the water quality standards/TMDLs for the Indian River Lagoon;

75. Award Plaintiffs their reasonable costs, fees, and expenses, including attorney's fees, associated with this litigation; and

76. Grant Plaintiffs such further relief as the Court may deem just and proper.

Respectfully submitted this 10th day of May, 2022.



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# **EXHIBIT 1**



December 20, 2021

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***VIA ELECTRONIC AND CERTIFIED MAIL***

**Re: Sixty-Day Notice of Violations of the Endangered Species Act for Failing to Reinitiate Consultation Concerning the Unusual Mortality Event for Manatees in the Indian River Lagoon**

Dear Officials of the U.S. Environmental Protection Agency:

On behalf of Center for Biological Diversity, Defenders of Wildlife, and Save the Manatee Club, we hereby provide notice in accordance with the citizen suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), that the U.S. Environmental Protection Agency (“EPA”) is in violation of the ESA for failing to reinitiate consultation under ESA section 7, *id.* § 1536, concerning water quality and the unprecedented mortality event for Atlantic Florida manatees (*Trichechus manatus latirostris*) (“manatees”) in the Indian River Lagoon. Specifically, the EPA has unlawfully failed to reinitiate section 7 consultation with U.S. Fish and Wildlife Service (“FWS”) in light of significant new information undermining EPA and FWS’s conclusions that the Clean Water Act (“CWA”) estuary-specific numeric nutrient criteria are not likely to adversely affect any federally listed species or their critical habitats, including the manatee and its habitat.

More than 1,000 manatees have died so far this year in Florida, as part of a catastrophic “Unusual Mortality Event.” This represents roughly double the average number of deaths in years prior, and it is the most deaths ever recorded in a year. More than half of those deaths occurred in the northern Indian River Lagoon due to starvation and malnutrition caused by seagrass die-offs attributable to nutrient pollution and associated harmful algal outbreaks.

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Congress enacted the ESA and CWA to prevent such harms. These statutes require that EPA-approved water quality standards ensure the protection of water quality and threatened species such as the manatee. However, the current estuary-specific numeric nutrient criteria fail to fulfill these mandates. New information shows that the current criteria suffer from lax enforcement, an inappropriately long trajectory to achieve compliance, and a failure to take into account the impact of legacy pollution. As a result, approximately 12% of the estimated Florida manatee population statewide has died, with the Atlantic subpopulation having lost approximately 19% of its population. In short, both the Indian River Lagoon and the manatee are presently in the midst of ecological collapse. Further, it appears likely that the 2021 Unusual Mortality Event will not be a one-time event, but rather portends a grim future of continued manatee deaths unless more effective actions are taken to address the key environmental factor driving them—nutrient pollution of key estuary habitats that is destroying habitat, including food for manatees and many other species. Together, the ESA and the CWA require such actions. This letter provides notice that your agency is violating the law by failing to take them.

## **I. LEGAL BACKGROUND**

### **A. EPA’s Obligations in Approving Water Quality Standards under the Clean Water Act**

The Clean Water Act was enacted almost 50 years ago to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.” Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, codified as amended at 33 U.S.C. §§ 1251–1387 (2013) (the “Clean Water Act”). To achieve this goal, the CWA requires states to set water quality standards protective of public health and the environment, 33 U.S.C. § 1313(c), and to develop pollution budgets known as “total maximum daily loads” (“TMDLs”) for each pollutant impairing a waterbody, *id.* § 1313(d); 40 C.F.R. § 130.2(i). These TMDLs set a numeric target reflecting the maximum amount of the pollutant that a waterbody can contain and still be considered in compliance with water quality standards. 33 U.S.C. § 1313(d).

EPA oversees Florida’s development of water quality standards and TMDLs. *Id.* § 1313(c)(3), (d)(2). Pursuant to guidance implementing EPA’s CWA regulations, EPA is to carefully review the adequacy of TMDLs, including ensuring that the TMDLs have a margin of safety to account for lack of knowledge concerning the relationship between load and wasteload allocations and water quality and that the TMDLs provide “reasonable assurances” that point and nonpoint source control measures will achieve the expected load reductions.<sup>1</sup>

### **B. EPA’s Consultation Obligations under the ESA**

Congress enacted the Endangered Species Act in 1973 to provide “a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “a program for the conservation of such endangered species and threatened species.” 16

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<sup>1</sup> See EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 (May 20, 2002), *available at* [https://www.epa.gov/sites/default/files/2015-10/documents/2002\\_06\\_04\\_tmdl\\_guidance\\_final52002.pdf](https://www.epa.gov/sites/default/files/2015-10/documents/2002_06_04_tmdl_guidance_final52002.pdf) (last visited Nov. 30, 2021).

U.S.C. § 1531(b). The statute contains an array of provisions designed to afford imperiled species “the highest of priorities,” so that they can recover to the point where federal protection is no longer needed. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

Section 7(a)(2) of the ESA imposes on federal agencies such as EPA a substantive duty to ensure that actions they authorize or carry out—including approval of a state’s water quality standards—are not likely to jeopardize listed species or destroy or adversely modify critical habitat designated for such species. 16 U.S.C. § 1536(a)(2); *see also* Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act, 66 Fed. Reg. 11202 (Feb. 22, 2001) (“EPA & FWS MOU”). Such “action agencies” must discharge this obligation in consultation with the appropriate expert fish and wildlife agency—FWS in the case of the manatee. *See id.*; 50 C.F.R. § 402.01(b). If the action agency determines its action may adversely affect listed species or critical habitat, it must initiate formal consultation with FWS. 50 C.F.R. § 402.14(a). If the action agency determines, with written concurrence of FWS, that the proposed action is not likely to adversely affect any listed species or critical habitat, the action agency need not initiate formal consultation. *Id.* § 402.13(c).

The ESA also requires that consultation be reinitiated in certain circumstances where “discretionary Federal involvement or control over the action has been retained or is authorized by law.” 50 C.F.R. § 402.16. With regards to state water quality standards, EPA has continuing discretionary involvement and control under 33 U.S.C. § 1313(c)(4)(B), which allows it to revise water quality standards “in any case where the [EPA] Administrator determines that a revised or new standard is necessary to meet the requirements of [the Clean Water Act].” *See also* EPA & FWS MOU at 11206 (“EPA and the Services have agreed that where information indicates an existing standard is not adequate to avoid jeopardizing listed species, or destroying or adversely modifying designated critical habitat, EPA will work with the State/Tribe to obtain revisions in the standard or, if necessary, revise the standards through the promulgation of federal water quality standards under section 303(c)(4)(B) of the CWA.”); *Wild Fish Conservancy v. United States Env’t Prot. Agency*, 331 F. Supp. 3d 1210, 1222–26 (W.D. Wash. 2018) (finding that EPA retains discretionary involvement and control over approved water quality standards for the purposes of reinitiating consultation). Reinitiation of consultation is required:

- (1) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or
- (4) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16(a).

## II. HISTORY OF INDIAN RIVER LAGOON WATER QUALITY STANDARDS AND ESA CONSULTATION

On June 13, 2012, Florida submitted revised water quality standards for EPA’s approval under 33 U.S.C. § 1313(c). *See* Decision Document of United States Environmental Protection Agency Determination Under § 303(c) of the Clean Water Act, Review of Amendments to Florida’s Rule 62-302 and 62-303 (Nov. 30, 2012) (approving Fla. Admin. Code Ann. r. 62-302.531). EPA approved the revisions on November 30, 2012. *Id.* The revisions included a rule adopting a framework for developing criteria to numerically interpret the existing statewide narrative nutrient criterion that “in no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna.” *Id.* at 18. The framework explains that where a site-specific nutrient analysis has been performed for a particular waterbody—including through development of a total maximum daily load—this site-specific analysis will be considered the applicable numeric interpretation of the narrative criterion for a particular waterbody. *Id.*; Fla. Admin. Code Ann. r. 62-302.531. For the Indian River Lagoon and its constituent Banana River Lagoon, Florida’s Department of Environmental Protection (“FDEP”) set TMDLs for nitrogen, phosphorus, and dissolved oxygen in 2009. *See* FDEP, TMDL Report, Nutrient and Dissolved Oxygen TMDLs for the Indian River and Banana River Lagoon (Mar. 2009). EPA approved these TMDLs as nutrient criteria on July 29, 2013, and they are codified as the “Estuary-Specific Numeric Interpretations of the Narrative Nutrient Criterion” under Fla Admin. Code r. 62-302.532(aa) (referencing Fla Admin. Code r. 62-304.520 (Indian River Lagoon TMDLs)).

Pursuant to section 7 of the ESA, EPA consulted with FWS—as well as with the National Marine Fisheries Service (“NMFS”)<sup>2</sup>—multiple times under 50 C.F.R. § 402.13 on its approval of Florida’s water quality standards. This included (1) consulting with FWS on EPA’s approval of Florida’s revisions in 2012;<sup>3</sup> (2) consulting with FWS on EPA’s approval of amendments to these revisions in 2013—which among other things, approved the specific TMDLs for the Indian River Lagoon;<sup>4</sup> and (3) consulting with FWS on EPA’s approval to changes made to Florida’s statewide estuary-specific numeric nutrient criteria in 2017 (which did not alter the previously approved TMDLs for Indian River Lagoon).<sup>5</sup>

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<sup>2</sup> *See* National Marine Fisheries Service, Biological Opinion on EPA Approval of Water Quality Standards Under Section 303 of the Clean Water Act 3–4 (July 29, 2016) (detailing consultation history with NMFS).

<sup>3</sup> Letter from Annie Godfrey, Chief of EPA Water Quality Standards Section, to Larry Williams, FWS Field Office Supervisor South Florida Ecological Services Office (Dec. 20, 2012).

<sup>4</sup> Letter from Joanne Benante, EPA Water Quality Planning Branch, to Larry Williams, FWS Field Office Supervisor South Florida Ecological Services Office (Oct. 25, 2013).

<sup>5</sup> Letter from Joanne Benante, EPA Chief Water Quality Planning Branch, to Dr. Heath Rauschenberger, FWS North Florida Ecological Services Office (Feb. 8, 2017).

In each of its informal consultations with FWS, EPA concluded that its approval would not adversely affect the manatee,<sup>6</sup> and FWS agreed.<sup>7</sup>

### III. NEW INFORMATION REQUIRES REINITIATION OF CONSULTATION

FWS has already recognized that reinitiation of consultation is required here, asking EPA on August 10, 2021, to reinitiate consultation. *See* Letter from Larry Williams, Florida State Supervisor of FWS, to Tony Able, Chief, Water Quality Planning Branch, U.S. EPA (Aug. 10, 2021). However, upon information and belief, no such consultation has been reinitiated.

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<sup>6</sup> *See* Letter from Annie Godfrey, Chief of EPA Water Quality Standards Section to Larry Williams, FWS Field Office Supervisor South Florida Ecological Services Office (Dec. 20, 2012) (transmitting Biological Evaluation concluding that “[t]he EPA has determined that its approval of the addition of numeric criteria for springs, lakes, streams, and estuaries, which are primarily outlined within Rule 62-302, as well as the procedure for developing alternative criteria will not likely adversely affect or will beneficially affect listed species, critical habitat and food sources”); Letter from Joanne Benante, EPA Water Quality Planning Branch, to Larry Williams, FWS Field Office Supervisor South Florida Ecological Services Office (Oct. 25, 2013) (transmitting Biological Evaluation concluding that “[o]verall, the EPA has determined that the chemical, physical, and biological data and the scientifically sound approaches used to develop the [numeric nutrient criteria (“NNC”)] resulted in NNC that will provide for the protection of a healthy, well-balanced biological community and will ensure the protection of water quality and aquatic life. For all of these reasons, the EPA has determined that the NNC adopted by the State of Florida . . . are not likely to adversely affect listed species and that implementation of the NNC will avoid excessive concentrations of nutrients that can lead to the imbalance of flora and fauna”); Letter from Joanne Benante, EPA Chief Water Quality Planning Branch, to Dr. Heath Rauschenberger, FWS North Florida Ecological Services Office (Feb. 8, 2017) (noting that “EPA continues to arrive at a finding of [No Effect and Not Likely to Adversely Affect] for the unchanged list of FWS’s species of concern[.]”)

<sup>7</sup> *See* Letter from Larry Williams, FWS Florida State Supervisor, to Annie Godfrey, Chief of EPA Water Quality Standards Section 7 (July 31, 2013) (“the Service concurs with EPA’s determination that the revised nutrient standards are not likely to adversely affect the West Indian manatee or its critical habitat”); Letter from Larry Williams, FWS Field Supervisor South Florida Ecological Services Office, to Joanne Benante, EPA Water Quality Planning Branch (Nov. 15, 2013) (“The adopted TMDLs in the Indian River Lagoon contain [Total Nitrogen (“TN”)] and [Total Phosphorus (“TP”)] loading targets that were established to support the restoration of seagrass beds. Historical seagrass coverage was evaluated in conjunction with historic estimates of point and nonpoint nutrient inputs to establish TMDLs suitable for seagrass proliferation. Implementation of the TMDLs would result in significant reductions in TN (51 percent) and TP (47 percent) loading in the central Indian River Lagoon, which includes the segments within the [FWS South Florida Ecological Services Office] area of responsibility (TMDL 2009b)”); Letter from Jay B. Herrington, FWS Field Supervisor, to Joanne Benante, EPA Water Quality Planning Branch (May 3, 2017) (“the Service concurs with EPA’s determination that the changes made to the Florida’s statewide estuary-specific numeric nutrient criteria under review is not likely to adversely affect any federally listed species or their critical habitats”).

Three significant pieces of new information underscore the requirement for EPA to reinstitute consultation with FWS under 50 C.F.R. § 402.16 on Florida's estuary-specific numeric nutrient criteria. First, new information suggests mass die-offs of manatees in the Indian River Lagoon are due to deterioration in water quality as a result of continuing nitrogen and phosphorus pollution, calling into question the overall adequacy of the current TMDLs. As FWS has already recognized, this unprecedented die-off alone requires reinstitution of consultation. Second, new information suggests there is a lack of reasonable assurance that the current measures to reduce point and nonpoint source pollution will achieve expected load reductions. Third, and finally, new information indicates that the current TMDLs do not adequately take into account pollution from legacy muck, and therefore do not contain an adequate margin of safety.

**A. New Information Suggests Mass Die-Offs of Manatees are Due to Continuing Deterioration in Water Quality**

More than 1,000 manatees have died so far this year in Florida, with the majority on the Atlantic coast as part of an unprecedented die-off that has been officially declared an “Unusual Mortality Event” by the Working Group on Marine Mammal Unusual Mortality Events and FWS.<sup>8</sup> This represents roughly double the average number of deaths in years prior, and it is the most deaths ever recorded in a year.<sup>9</sup> The Florida Fish and Wildlife Conservation Commission estimates the total number of Florida manatees to have been 8,800 as of 2015–16, with roughly 4,000 on the Atlantic coast.<sup>10</sup> In other words, Florida has lost roughly 12% of its manatee population this year alone, and nearly 19% of the Atlantic population.<sup>11</sup>

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<sup>8</sup> See Florida Fish and Wildlife Conservation Commission, Marine Mammal Pathobiology Laboratory, 2021 Preliminary Manatee Mortality Table with 5-Year Summary From 01/01/2021 to 12/03/2021, *available at* <https://myfwc.com/media/25428/preliminary.pdf> (last visited Dec. 16, 2021) (stating that a total of 1038 manatees have died in Florida from 01/01/2021 to 12/03/2021); Florida Fish and Wildlife Conservation Commission, Manatee Mortality Event Along The East Coast 2020-2021, *available at* <https://myfwc.com/research/manatee/rescue-mortality-response/ume/> (last visited Dec. 15, 2021).

<sup>9</sup> *Id.*; see also Allen, As Seagrass Habitats Decline, Florida Manatees Are Dying Of Starvation, NPR (June 21, 2021), *available at* <https://www.npr.org/2021/06/21/1006332218/as-seagrass-habitats-decline-florida-manatees-are-dying-of-starvation> (last visited Dec. 1, 2021).

<sup>10</sup> Hostetler, et al., Updated Statewide Abundance Estimates for the Florida Manatee (2018), *available at* [https://f50006a.eos-intl.net/ELIBSQL12\\_F50006A\\_Documents/TR23-18Hostetler-USAEF.pdf](https://f50006a.eos-intl.net/ELIBSQL12_F50006A_Documents/TR23-18Hostetler-USAEF.pdf) (last visited Dec. 1, 2021).

<sup>11</sup> *Id.*; see also Florida Fish and Wildlife Conservation Commission, Manatee Mortalities on the Florida Atlantic Coast, Staff Report (Aug. 4, 2021), *available at* <https://www.wfla.com/wp-content/uploads/sites/71/2021/08/FWC-Manatee-Mortalities-Report.pdf> (last visited Dec. 16, 2021).

The majority of these deaths have occurred in the Indian River Lagoon, where a die-off of seagrass has left the manatees to starve to death.<sup>12</sup> The Indian River Lagoon is an estuary that includes Mosquito Lagoon, Banana River Lagoon, and the Indian River. It has more species of plants and animals than any other estuary in North America. The lagoon's seagrass includes Johnson's seagrass, a rare seagrass found only in lagoons on the east coast of Florida that was the first marine plant species to be listed under the ESA.<sup>13</sup> The seagrass in the lagoon formerly provided habitat and forage for many commercially, recreationally, and ecologically important species, including manatees, sea turtles, spotted sea trout, redfish (red drum), snook, tarpon, mullet, sheepshead, pompano, seahorses, blue crabs, hermit crabs, pink shrimp, scallops, clams, marine worms, marine snails, and other crustaceans.<sup>14</sup> Seagrass health is therefore not only critical to the survival of the manatee, but to the persistence of other threatened and endangered species of plants and wildlife, the health of commercially and recreationally important species, and the functioning of the ecosystem overall.

The die-off of seagrass is directly related to deteriorating water quality in the Indian River Lagoon.<sup>15</sup> As human development has increased around the Indian River Lagoon, so has the input of nitrogen and phosphorus from wastewater treatment discharges, leaking septic systems, and stormwater runoff carrying nitrogen fertilizer, among other sources. These nutrients, in turn, feed algae super outbreaks, which block light from getting to the seagrass, causing it to die.<sup>16</sup>

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<sup>12</sup> See Memorandum from Gil McRae, Director, Fish and Wildlife Research Institute, to Florida Fish and Wildlife Conservation Commissioners re: Staff Report – Unusual Manatee Mortality along the Florida Atlantic coast (Aug. 4, 2021) (“This unusual mortality event has been attributed to the effects of starvation tied to lack of suitable forage availability associated with winter aggregation at warm water sites.”); Lefebvre et al., Characterizing Manatee habitat use and seagrass grazing in Florida and Puerto Rico: implications for conservation and management, *Pacific Conservation Biology* Vol 5: 289–98 (2000) (explaining the importance of seagrass to manatee diets).

<sup>13</sup> National Marine Fisheries Service, Final Recovery Plan for Johnson's Seagrass (Sept. 2002).

<sup>14</sup> See U.S. Fish and Wildlife Service, Indian River Lagoon, *available at* [https://www.fws.gov/refuge/pelican\\_island/wildlife\\_and\\_habitat/indian\\_river\\_lagoon.html](https://www.fws.gov/refuge/pelican_island/wildlife_and_habitat/indian_river_lagoon.html) (last visited Oct. 12, 2021); St. Johns River Water Management District, Indian River Lagoon: An Introduction to a National Treasure (2007).

<sup>15</sup> See Memorandum from Gil McRae, Director, Fish and Wildlife Research Institute, to Florida Fish and Wildlife Conservation Commissioners re: Staff Report – Unusual Manatee Mortality along the Florida Atlantic coast (Aug. 4, 2021) (“Seagrass losses in the Indian River Lagoon have been significant due to continuing water quality issues.”).

<sup>16</sup> See, e.g., Lapointe, et al., Nutrient Over-Enrichment and Light Limitation of Seagrass Communities in the Indian River Lagoon, an Urbanized Subtropical Estuary, *Science of the Total Environment* 699 (2020). This deteriorating water quality has also led to other effects on protected species. For instance, a 2021 article found a strong correlation between water pollution in the Indian River Lagoon and the prevalence of tumors in endangered green sea turtles. See Sposato, et al., Evaluation of Immune Function in Two Populations of Green Sea Turtles (*Chelonia mydas*) in a Degraded Versus a Nondegraded Habitat, *J. Wildlife Diseases* 57(4):761-772 (2021).

As FWS has already recognized, the continued deterioration in water quality—leading to algae outbreaks “that have increased in frequency and duration” and have caused the recent unusual manatee mortality event—require reinitiation of consultation under 50 C.F.R. § 402.16(a)(2) on EPA’s approval of the numeric nutrient criteria for water quality standards in estuaries. *See* Letter from Larry Williams, Florida State Supervisor of FWS, to Tony Able, Chief, Water Quality Planning Branch, U.S. EPA (Aug. 10, 2021). Despite FWS’s call for reinitiation, however, available information indicates that to date neither agency has formally reinitiated ESA consultation. *See id.* (asking EPA to reinitiate consultation, without itself formally reinitiating consultation). Given the continued water quality deterioration and increasing die-off of manatees, EPA must immediately reinitiate consultation to address the Unusual Mortality Event and to reconsider whether the current TMDLs are adequate to protect the manatee. As discussed below, significant new information indicates they are not.

## **B. New Information Suggests a Lack of Reasonable Assurances that Point and Nonpoint Source Reductions Will Achieve Expected Load Reductions**

In addition to the recent unprecedented die-off of manatees, a growing record of inadequate efforts to comply with and enforce existing water-quality safeguards also necessitates reinitiation of consultation. For EPA to approve a TMDL, EPA must determine that the TMDL provides reasonable assurances that point and nonpoint source control measures will achieve expected load reductions.<sup>17</sup> Lax enforcement and compliance for both point and nonpoint sources suggests that the current TMDLs are ineffective at controlling nutrients into the Indian River Lagoon. EPA must therefore reinitiate consultation to consider this new information suggesting that the current TMDLs are not being effectively implemented and that the TMDLs lack reasonable assurances they will achieve load reductions. *See* 50 C.F.R. § 402.16(a)(1), (3).

### **1. Recent Reports Suggest Current Stormwater and Wastewater Treatment Facilities Fail to Meet the Presumption that they Achieve Expected Load Reductions**

Several recent reports indicate that point source control measures and enforcement are inadequate, suggesting that the TMDLs must be revisited to ensure that they provide reasonable assurances that the wasteload allocation from point sources will be achieved.

First, in 2019, a “Blue-green Algae Task Force,” appointed by Governor DeSantis to aid the Florida Department of Environmental Protection, concluded that “[t]he presumption that a stormwater treatment system constructed and permitted in compliance with [best management

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<sup>17</sup> *See* 40 C.F.R. 122.44(d)(1)(vii)(B) (requiring effluent limits in permits be consistent with “the assumptions and requirements of any available wasteload allocation” in an approved TMDL); EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 at 4 (May 20, 2002), *available at* [https://www.epa.gov/sites/default/files/2015-10/documents/2002\\_06\\_04\\_tmdl\\_guidance\\_final52002.pdf](https://www.epa.gov/sites/default/files/2015-10/documents/2002_06_04_tmdl_guidance_final52002.pdf) (last visited Nov. 30, 2021) (explaining that when waters are impaired by both point and nonpoint sources, “the TMDL should provide reasonable assurances that nonpoint source control measures will achieve expected load reductions in order for the TMDL to be approvable”).

practice] design criteria will not cause or contribute to violations of surface water quality standards in adjacent and/or connected waterbodies has been evaluated and challenged. Available data suggest that a substantial number of stormwater treatment systems throughout the state fail to achieve their presumed performance standards.” Blue-green Algae Task Force, DRAFT consensus Document #1 Final Draft – Revised 3 October 2019. The Task Force recommended “the development and implementation of a stormwater system inspection and monitoring program with the goal of identifying improperly functioning and/or failing systems so that corrective action can be taken to reduce nutrient pollution and other negative environmental impacts.” *Id.* It further recommended “that stormwater design criteria be revised and updated to incorporate recent advances in stormwater treatment technologies and other practices that have demonstrated environmental benefits; nutrient reduction specifically.” *Id.*

Second, a 2018 review of sewage pollution in the Indian River Lagoon suggested that harmful algae outbreaks are initiated and expanded by wet weather discharges from municipal wastewater treatment facilities. *See* Barile, Widespread Sewage Pollution of the Indian River Lagoon System, Florida (USA) Resolved by Spatial Analyses of Macroalgal Biogeochemistry, *Marine Pollution Bulletin* 128 (2018). The article explained that although direct surface water discharges of treated human wastewater effluent are prohibited, up to 90 days per year of “emergency wet weather” surface discharges are allowed when significant rain events overload the treatment system capacities. *Id.* at 559; *see also* Indian River Lagoon Act, Chapter 90-262 Laws of Florida, Sec. 2(c) (allowing wet weather discharges). The article posits that these poorly reported wet weather discharges—which can be several million liters per day per treatment plant during wet season events—may be a key factor supporting harmful algal outbreaks. Barile at 560, 572. The article suggests that significant wastewater treatment infrastructure upgrades, including conversion of municipal wastewater treatment plants to high nutrient removal advanced wastewater treatment, as well as mandatory septic-to-sewer conversion, are needed for seagrass regrowth in the Indian River Lagoon. *Id.* at 572.<sup>18</sup>

Finally, a 2020 Florida Public Employees for Environmental Responsibility (“Florida PEER”) report disclosed that Brevard County had 38 instances of unpermitted sewage discharges, totaling 552,040 gallons discharged. *See* Florida PEER, Report on Enforcement Efforts by the Florida Department of Environmental Protection (2020), *available at* <https://www.peer.org/2020-florida-enforcement-report/> (last visited Dec. 1, 2021). Florida PEER also reported that the Florida Department of Environmental Protection conducted fewer inspections in 2020 than in previous years, and that the severity of fines decreased. Moreover, the “the enforcement actions used by the FDEP were largely short-form consent orders that required nothing more than paying a penalty, i.e., the traffic ticket approach.” *Id.* at 35. As Florida PEER Director Jerry Phillips explained, “[r]ather than seeking major reductions in our pollution load, DEP’s reliance on small fines makes pollution an acceptable cost of doing business.” *See* Florida PEER, Press Release, Florida Pollution Enforcement Fell into Covid Coma, (Sep. 15, 2021) *available at* <https://www.peer.org/florida-pollution-enforcement-fell->

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<sup>18</sup> *See also* Lapointe, et al., Evidence of Sewage-Driven Eutrophication and Harmful Algal Blooms in Florida’s Indian River Lagoon, 43 *Harmful Algae* 82–102 (March 5, 2015) (suggesting that seagrass loss due to pollution from sewage indicates the need for improved sewage collection and treatment).

into-covid-coma/ (last visited Dec. 1, 2021). This information thus suggests that lax enforcement of unpermitted sewage discharges could be further contributing to nitrogen and phosphorous pollution in the Indian River Lagoon.<sup>19</sup>

EPA must thus reinitiate consultation with FWS under 50 C.F.R. § 402.16 to take into consideration these recent reports demonstrating the lack of reasonable assurances that point source discharge control measures will achieve required load reductions.

## **2. The TMDL Lacks Reasonable Assurances that the Agricultural Best Management Practices Designed to Control Nonpoint Source Pollution Are Sufficient and Achievable**

In addition to recent information indicating that point source discharge controls do not provide reasonable assurances that load reductions will be achieved, further new information suggests that nonpoint sources present an additional source of pollution that is inadequately addressed. Agricultural nonpoint sources are a significant contributor of nitrogen and phosphorous into the Indian River Lagoon. *See* FDEP, Central Indian River Lagoon Basin Management Action Plan 17 (Feb. 2021) (“CIRL BMAP”). To address these nonpoint sources, the FDEP has created three Basin Management Action Plans (“BMAPs”), dividing up the Indian River Lagoon into three subbasins: (1) the Central Indian River Lagoon; (2) the North Indian River Lagoon (“NIRL BMAP”); and (3) the Banana River Lagoon (“BRL BMAP”). These BMAPs include agricultural best management practices (“BMPs”) that are aimed at reducing nitrogen and phosphorus runoff from agricultural practices. Under Florida law, it is the agricultural landowner’s responsibility to implement the BMPs, and landowners who do not enroll in the BMP Program are supposed to be referred to FDEP for enforcement action.

Unfortunately, however, current landowner enrollment in the BMP program is very low: only 25% of agricultural acres are currently enrolled in the Central Indian River Lagoon, *see* CIRL BMAP at 153; only 6% are enrolled in the North Indian River Lagoon, *see* NIRL BMAP at 27; and 0% are enrolled in the Banana River Lagoon, *see* BRL BMAP at 22. This is far below the current average of 62% enrollment in the BMP Program statewide, and 82% enrollment of irrigated agricultural acres statewide. *See* Florida Department of Agriculture and Consumer Services, Office of Agricultural Water Policy, Status of Implementation of Agricultural Nonpoint Source Best Management Practices 2 (July 1, 2021). Moreover, although Florida Department of Agriculture and Consumer Services (“FDACS”) is required to verify that landowners are properly implementing BMPs, including by conducting site visits every two years, FDACS conducted relatively few site visits to the Indian River Lagoon in 2020: only 91 out of 2,824 total visits statewide. *See id.* at 17. Furthermore, of the more than 6,600 referrals statewide from FDACS to FDEP for enforcement for agricultural producers not following the

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<sup>19</sup> *See also* Waymer and Vazquez, Sewage spill keep taxing Indian River Lagoon, other waters; state issues fines, but is that enough?, Florida Today (Aug. 15, 2019). In late 2020, more than seven million gallons of raw sewage spilled into a pond at Sand Point Park that flows directly into the Indian River Lagoon, resulting in a fish die-off. *See* Vazquez, Protestors call for action in Titusville after raw sewage spill into Indian River Lagoon, Florida Today (Jan 9, 2021); Waymer, Titusville sewage fallout could top half a million, Florida Today (May 7, 2021).

rules, none have faced penalties.<sup>20</sup> As Florida Agricultural Commissioner Nikki Fried described the situation in August, 2021, “[u]nfortunately we have not seen a hammer come down from FDEP. . . . There’s a carrot and there’s a stick. [FDACS] is the carrot, and FDEP is the stick. And the stick’s not working.”<sup>21</sup>

Finally, although the BMAPs intend to increase enrollment over time, the BMAPs do not aim to achieve full targeted load reductions until 2035, *see, e.g.*, CIRL BMAP at 16. This lengthy trajectory, coupled with the currently low enrollment by agricultural landowners in the BMP Program and lack of meaningful enforcement, is inappropriate and insufficient given the current ecological collapse of the Indian River Lagoon. EPA must therefore reinitiate consultation with FWS to consider new information demonstrating that the current enrollment and enforcement of BMPs, and planned trajectory of nitrogen and phosphorus reductions, has been insufficient to prevent seagrass and manatee die-offs, and that there are presently insufficient assurances that the measures to reduce nonpoint source pollution in the TMDLs will achieve expected load reductions.

**C. New Information Suggests the TMDLs Overlook, and Should Take into Account, Ongoing Contributions of Nitrogen and Phosphorous from Legacy Pollution**

New information also highlights the important role that legacy pollution plays in the ecosystem collapse that is underway in the Indian River Lagoon, yet the existing TMDLs fail to account for this factor. Over time, the harmful levels of nutrients entering the Indian River Lagoon have led to muck accumulation on the lagoon bottom, which “fluxes” nutrients back into the lagoon. There are an estimated 5 million cubic yards of muck within the Indian River Lagoon, delivering roughly 30% of the total nutrient load.<sup>22</sup> Brevard County recently posited that “[n]itrogen and phosphorus released each year as muck decays are now larger than any current source of nutrient pollution to lagoon waters.” Tetra Tech, Inc. and CloseWaters LLC. (2021) Save Our Indian River Lagoon Project Plan 2021 Update for Brevard County, Natural Resources Management Department Brevard County, Florida. Not only does legacy muck contribute to

<sup>20</sup> *See* Chesnes, Ag Commissioner Nikki Fried wants boots on the ground to measure, reduce pollution, TCPalm (Aug. 4, 2021), *available at* <https://www.tcpalm.com/story/news/local/indian-river-lagoon/2021/08/04/nikki-fried-visits-sewalls-point-discuss-clean-water-initiative/5452933001/> (last visited Dec. 1, 2021).

<sup>21</sup> *Id.* *See also* MacLaughlin, Will Basin Management Action Plans Restore Florida’s Impaired Waters?, 89 Fla. B. J. 31 (Feb. 2015) (suggesting that BMAPs “need more regulatory teeth if they are to succeed”); Blue-green Algae Task Force, DRAFT consensus Document #1 Final Draft – Revised (Oct. 3, 2019) (“[T]he [Blue-green Algae Task Force] recommends that the effectiveness of BMPs be supported by adequate data to justify the presumption of compliance granted upon enrollment and implementation”).

<sup>22</sup> Fox and Tefry, Lagoon-wide Application of the Quick-Flux Technique to determine Sediment Nitrogen and Phosphorus Fluxes, Submitted to Brevard County, Fl. Natural Resources Management Department (June 2019); *see also* Tetra Tech, Inc. and CloseWaters LLC., Save Our Indian River Lagoon Project Plan 2021 Update for Brevard County, Natural Resources Management Department Brevard County, Florida (Feb. 2021), *available at* <https://www.brevardfl.gov/SaveOurLagoon/ProjectPlan> (last visited on Dec. 1, 2021).

nitrogen and phosphorus pollution, but it can result in resuspension of sediment which decreases light availability to seagrass and further contributes to seagrass loss.<sup>23</sup> It can also cover the natural bottom of the lagoon so that the seagrass is unable to grow.<sup>24</sup>

EPA’s TMDL guidance explains that TMDL submittals should identify all “point and nonpoint sources of the pollutant of concern, including the location of the source(s) and the quantity of the loading” in order for EPA to adequately review the load and wasteload allocations and develop an adequate margin of safety “to account for any lack of knowledge concerning the relationship between load and wasteload allocations and water quality.” EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 at 1, 4 (May 20, 2002). But despite the outsize importance of this legacy muck as a pollution source, legacy inputs were not accounted for in the nitrogen and phosphorus TMDLs and the “Spatial Watershed Iterative Loading or ‘SWIL’ Model”—the model that calculates the load allocations for the Indian River Lagoon BMAPs—does not take this legacy muck into account. *See, e.g.*, NIRL BMAP at 39.

Without addressing legacy muck, it is likely that algal outbreaks and seagrass loss will continue.<sup>25</sup> EPA must therefore reinitiate consultation with FWS in light of evidence that the current TMDLs lack an adequate margin of safety that takes into account the nutrient and sediment contributions of legacy pollution.

#### IV. CONCLUSION

The ESA authorizes citizen suits to enjoin violations of the ESA. 16 U.S.C. § 1540(g)(1)(a). As set forth above, EPA is in violation of the ESA for failing to reinitiate formal consultation with FWS concerning EPA’s approval of Florida’s estuary-specific numeric nutrient criteria in light of recent manatee mortality and new information suggesting that the current numeric nutrient standards are insufficient to protect against the current manatee die-off as well as protect against future mortality events. If EPA is unwilling to take action within sixty days to reinitiate consultation, we plan to seek redress through litigation.

Sincerely,

Elizabeth Forsyth  
Earthjustice Biodiversity Defense Program

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<sup>23</sup> Philips, Factors Affecting the Abundance of Phytoplankton in a Restricted Subtropical Lagoon, The Indian River Lagoon, Florida, USA, Estuarine, Coastal and Shelf Science (Sep. 2002).

<sup>24</sup> Florida Tech, Florida Tech Scientists and Engineers Seek Answers for Muck in the Indian River Lagoon (Aug. 13, 2017); Waymer, Muck: The arch-enemy lurks deep in Indian River Lagoon – Muck problem expensive to solve, Florida Today (Nov. 24, 2013).

<sup>25</sup> *See* Missimer, et al., Legacy Phosphorus in Lake Okeechobee (Florida, USA) Sediments: A Review and New Perspective, Water (2021) (explaining that in Lake Okeechobee, “[d]espite major efforts to control external nutrient loading into the lake, the high frequency of algal blooms will continue until the muds bearing legacy nutrients are removed from the lake”).

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***VIA ELECTRONIC AND CERTIFIED MAIL***

**Re: Supplement to Sixty-Day Notice of Violations of the Endangered Species Act  
for Failing to Reinitiate Consultation Concerning the Unusual Mortality  
Event for Manatees in the Indian River Lagoon**

Dear Officials of the U.S. Environmental Protection Agency:

On behalf of Center for Biological Diversity, Defenders of Wildlife, and Save the Manatee Club, we hereby provide a supplement to our December 20, 2021 notice that the U.S. Environmental Protection Agency is in violation of the Endangered Species Act (“ESA”) for failing to reinitiate consultation with the U.S. Fish and Wildlife Service under ESA section 7, *id.* § 1536, concerning water quality and the unprecedented mortality event for Atlantic Florida manatees (*Trichechus manatus latirostris*) (“manatees”) in the Indian River Lagoon. This supplement includes an expert report by Dr. Peter Barile detailing additional ways the current EPA-approved estuary-specific numeric nutrient criteria are inadequate to prevent seagrass die-off, harmful algal outbreaks, and further manatee mortality events in the Indian River Lagoon. Specifically, Dr. Barile’s report explains that new information demonstrates that nutrient loads from septic tanks were underestimated in the approved numeric nutrient criteria and that the criteria do not account for the confounding role of climate change in driving nutrient loading.

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The report concludes that based on this new information, the current estuary-specific numeric nutrient criteria are currently “an order of magnitude” above maximum concentrations that would support seagrass and should be revised accordingly to prevent eutrophication, loss of seagrass, and harm to the manatee.

Sincerely,

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## **Report on recent scientific evidence (post-2013) to compel the USEPA and FDEP to reassess Indian River Lagoon, FL Numerical Nutrient Criteria**

Peter Barile, Ph.D. Senior Scientist  
Marine Research & Consulting, Inc., Melbourne FL

This is an expert report by Peter Barile, Ph.D., Senior Scientist, Marine Research & Consulting, Inc. Melbourne, Florida, on the scientific description of the health of the Indian River Lagoon as it relates to the 2013 EPA-approved Numerical Nutrient Criteria for the Indian River Lagoon system, excess nutrient loading and concentrations, harmful algal blooms and subsequently to seagrasses die-off and loss of over 400 manatees in Brevard County in 2021.

Dr. Barile has a Ph.D. in Environmental Sciences, a Master of Science degree in Marine Biology and a Bachelor's degree in Biological Sciences, all from Florida Tech in Melbourne, FL. Dr. Barile is a former Link Foundation Post Doctoral Fellow in the Division of Marine Science at Harbor Branch Oceanographic Institution in Ft. Pierce, FL. and a former NOAA Sea Grant- Knauss Marine Policy Fellow with residence in the US federal government's executive branch on ocean policy development at the National Science Foundation in Washington, D.C. Dr. Barile has 30 years of experience as a scientist and has authored over 20 peer-reviewed scientific articles, book chapters and public policy documents largely on Florida aquatic ecosystems, including the Indian River Lagoon. He has been relied upon to give expert consultation and testimony to the Florida legislature on the role of land-based sources of pollution to Florida's aquatic ecosystems and served on the Florida Senate's Consumer Fertilizer Task Force.

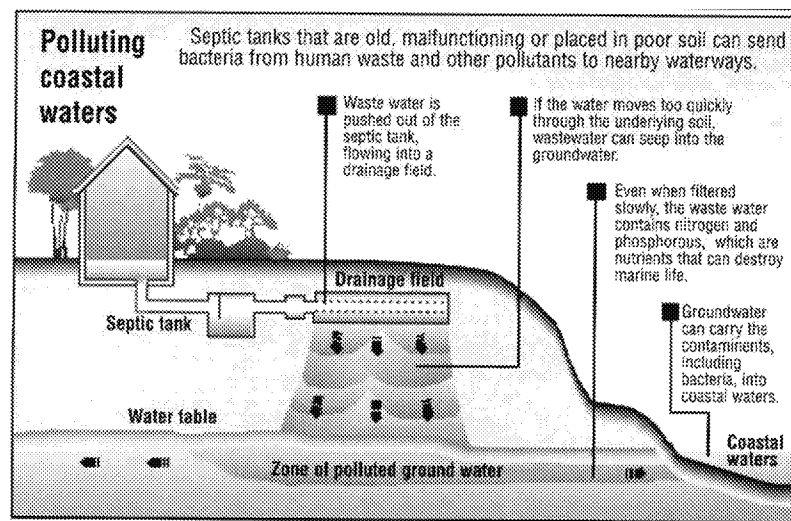
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This report addresses new scientific information that may be used to compel the US Environmental Protection Agency (EPA) under the Clean Water Act to require the Florida Department of Environmental Protection (FDEP) to reassess its Numerical Nutrient Criteria (NNC) for Impaired Waters of the Indian River Lagoon. This analysis includes new scientific evidence, since adoption of the 2013 EPA-approved NNC, revising the understanding of nutrient loading sources to the IRL system and processes that now confound the models used to create the IRL NNC. Since the EPA's adoption of the 2013 NNC, the FDEP's TMDL nutrient reduction

regulatory program has resulted in 1) annual nutrient load and nutrient concentration exceedances that have resulted in 2) unprecedented high density phytoplankton blooms, 3) a 95% loss of historic seagrass coverage in the northern Indian River Lagoon (NIRL), and 4) subsequent die-off of nearly 400 manatees in the NIRL BMAP/TMDL area during 2021.

### 1) Florida DEP underestimated the contribution of nutrient loads from septic tanks

Recent modeling work in Florida indicates that nutrient loading from septic tanks (OSDS) is the second largest nutrient loading source to Florida's aquatic ecosystems (Badruzzaman et al. 2012). The University of Florida's Institute of Food & Agricultural Sciences estimates that there are 2.6 million septic tanks in the state that discharge nearly 426 million gallons of wastewater per day into Florida's ground and surface waters (UF-IFAS 2022). Nearly 300,000 OSDS are in the counties along the IRL system. The widespread pollution of OSDS effluent into the IRL is supported by the hydrogeological properties of the surficial aquifer along the Lagoon that mobilizes effluent downgradient to the IRL's surface waters.



From: Barile and Lapointe (1999)

The EPA's NNC are based upon a NIRL BMAP nutrient load estimate that there are 16,171 residences within this watershed basin that utilize Onsite Sewage Disposal Systems (OSDS) or septic tanks for human waste water treatment (FDEP 2021).

This value may be an underestimate, as Brevard County alone has nearly 90,000 residences on septic tanks, where the SJRWMD (1993) estimated that nearly 70% may be “problem tanks” where changing environmental conditions may directly mobilize effluent to nearby surface or groundwaters beyond those available in the TMDL estimates for the central (CIRL) and northern (NIRL) Indian River Lagoon BMAP areas.

Barile (2018) estimated that 43% of the residences and a total of 91,630 residences utilize septic tanks for human sewage disposal in Brevard County. With flooding conditions associated with heavy wet weather and tropical storm activity, steady state models of septic tank effluent loading to adjacent surface waters, such as the SWIL model used in the FDEP’s NIRL BMAP nutrient loading estimates, are recognized to be conservative and an underestimate of this significant nutrient loading source.

In fact, a 2016 State of Florida South Florida Water Management District resolution (Resolution of the Governing Board #2016-0712, July 14, 2016) indicated that ***“human wastewater including septic tanks is the major source of excess nitrogen in the Indian River Lagoon and is underestimated in past nutrient loading models.”***

Figure 2 to the right is the 2021 FDEP BMAP of the residential septic systems (OSDS) in the NIRL watershed.

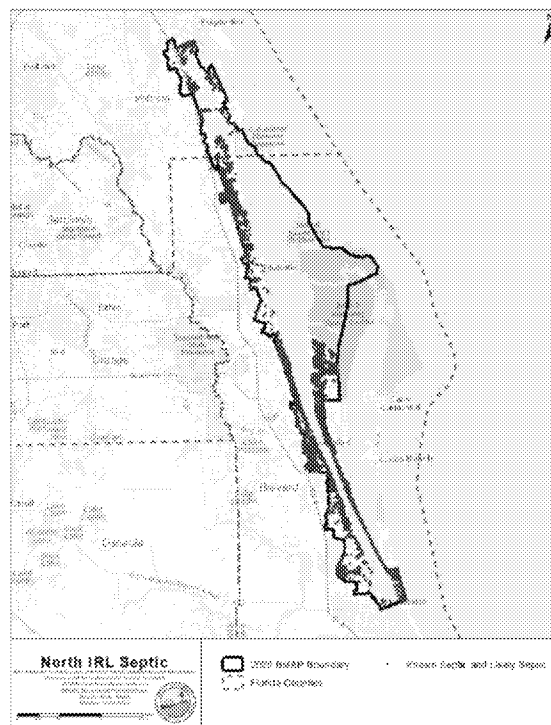


Figure 2. Location of septic systems in the NIRL.

The process of mobilization of septic tank (OSDS) effluent, as a previously underestimated and significant nutrient loading source to the Indian River Lagoon, has been documented recently in several published peer-reviewed academic journal contributions.

In the counties along the ~150 mile long lagoon, nearly 50% of the residences utilize OSDS for wastewater treatment (Barile, 2018), which is significantly higher than the Florida or US national average.

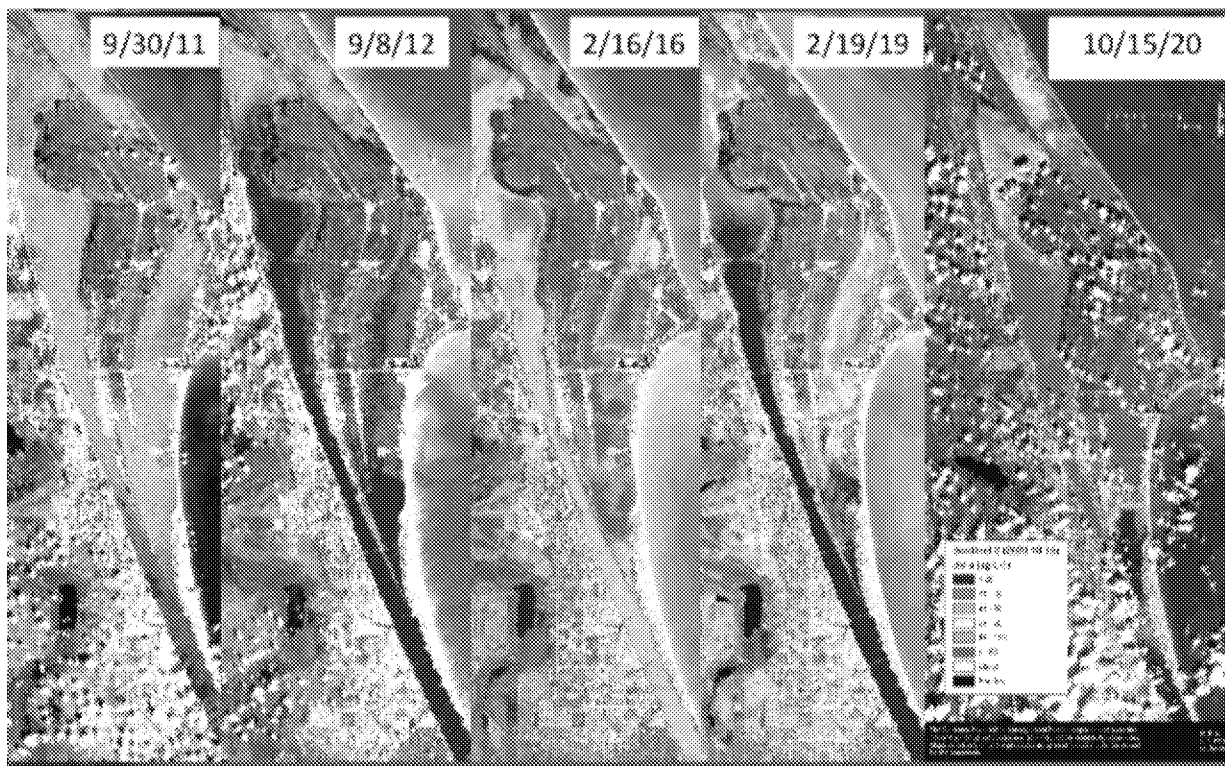
**Lapointe et al. (2017)** reported significantly high concentrations of septic tank (OSDS) inorganic nitrogen and phosphorus in groundwater monitor wells downgradient and adjacent to residential communities utilizing OSDS in the St. Lucie River, FL the primary tributary to the southern IRL. In adjacent surface waters evidence of significantly elevated wastewater nutrients were detected along with the conservative synthetic wastewater tracer, sucralose. Macroalgae and phytoplankton HAB blooms in both the St. Lucie River and southern Indian River Lagoon were enriched with OSDS wastewater nitrogen as a primary source, including the “green guacamole” *Microcystis* blooms that caused a public health crisis and international media attention in the summer of 2016.

**Herren et al. (2021)** reported the movement of septic tank (OSDS) effluent with high concentrations of reactive nitrogen and phosphorus into adjacent groundwaters and then into adjacent surface waters of the Sebastian River and Vero Beach lateral canal tributaries and into the CIRL. They traced OSDS as the dominant nitrogen source into macroalgae HABs in the downstream estuary. The study further used a conservative wastewater tracer, sucralose, as an additional line of evidence to trace OSDS loading from OSDS drainfields into adjacent ground and surface waters. There was significantly higher movement of OSDS nitrogen and phosphorus into adjacent ground and surface waters in the rainy “wet” season compared to the dry season.

**Lapointe et al. (2015)** reported wastewater nitrogen from OSDS as the primary loading source supporting macroalgae HABs at sites along the ~150 mi. IRL system. Sewage nitrogen from OSDS was also reported as a primary source of nitrogen supporting “super bloom” and “brown tide” phytoplankton blooms in the Indian River Lagoon. Total dissolved nitrogen and phosphorus concentrations were also measured above EPA’s NNC nutrient thresholds despite high concentration phytoplankton blooms and macroalgae blooms that should deplete water column nutrient concentrations.

**Kang et al. (2015)** reported for the 2012-2013 “brown tide” *Aureoumbra lagunensis* bloom event in the NIRL and Mosquito Lagoon that this HAB species was supported by a sewage nitrogen source from OSDS in the adjacent watersheds. This brown tide in 2012-2013 was a driver in the loss of ~95% of the seagrasses in the NIRL where the 2021 manatee UME occurred.

**Barile (2018)** documented widespread incorporation of wastewater nitrogen into macroalgal biomass at > 70 sites within tributaries and among the IRL system from Volusia to Palm Beach County. The study indicates that macroalgae HAB species incorporate elevated nitrogen and phosphorus from wastewater into their biomass more significantly during the rainy “wet season” when both elevated mobilization of nearby OSDS effluent sources and where dilapidate wastewater infrastructure either leaks or spills occur. Higher macroalgae tissue nitrogen contents in the rainy season also suggest that nitrogen loads are “externally” derived, and not supplied by “internal” cycling from the sediments or muck deposits.



SJRWMD (2021) Composite image of 2011-2020 HAB chlorophyll levels in the NIRL, all color shades lighter than blue (green, yellow, orange and red) are indicative of excessive HAB chlorophyll levels with higher concentrations from green to red. For reference, any shade darker than “purple” is an NNC exceedance. The HABs in “red” are >20x over the NNC concentration threshold for chlorophyll.

**2) The 2013 EPA NNC for the IRL may not be adequate to mitigate harmful algal blooms**

The northern and central IRL, Banana River and Mosquito River Lagoons, all “Impaired Waters” portions of the Indian River Lagoon system subject to Clean Water Act and subsequent EPA NNC regulatory action, experienced historically unprecedented and significant “Super blooms” of phytoplankton in 2011-2012 as the FDEP’s NNC & TMDL’s were going through review and adoption by the EPA. Since the adoption of the 2013 EPA-approved NNCs, nearly every rainy season since has caused excessive external nutrient loads (still ~50% above 2021 NIRL BMAP threshold nitrogen and phosphorus loading estimates) that have resulted in unprecedented phytoplankton and macroalgal HABs.

**Whitehouse and Lapointe 2015** reported that widespread macroalgae HABs, *Chaetomorpha* sp. and *Ulva* sp., in the NIRL that overgrow and shade out seagrasses as they have high uptake affinities for low levels of inorganic nitrogen and phosphorus. These macroalgae HAB species, through this physiological ecology study, are demonstrated to reach maximum photosynthetic rates (e.g. *Ulva* sp. doubling biomass every 2 days) at very low level nutrient concentrations, well below the 2013 EPA-approved NNC’s for nitrogen and phosphorus. This peer-reviewed scientific study concludes that the current NNC’s are not sufficient to limit HABs in the northern IRL where >95% seagrass die-off has occurred and >400 manatees died in 2021.

**3) The 2013 EPA-approved NNC for the IRL may not be adequate to mitigate seagrass die-off**

The process of seagrass loss in estuaries is directly related to water quality declines. Specifically, these processes have been well documented for the northern Indian River Lagoon. Lapointe et al. (2015) reported the relationship between human sewage nitrogen, blooms of phytoplankton and macroalgae cover and their relation to seagrass loss in the NIRL. The 2021 FDEP BMAP TMDL report for the NIRL has acknowledged the relationships between poor water quality and seagrass demise, and that water quality has been “non-compliant” to support seagrass growth since 2007, per the statement below.

***“The mean depth limits of seagrass coverage in the IRL decreased over the years because of changes in water quality resulting from anthropogenic influences. As polluted runoff reaches the Lagoon, it contributes to conditions that prevent the seagrass from growing in deeper water.”***

Since the 2013 BMAP, further evaluations of the seagrass depth limits in the NIRL have been conducted to reassess whether the NIRL project zones have continued to be compliant. **Table 23** and **Table 24** list the results of both steps of these evaluations since 2013, including the number of years that passed Step 2 of the evaluation. In 2020, the evaluation was conducted using the 2013, 2015, 2017, and 2019 seagrass mapping data, which were the latest datasets available at that time. **Figure 15** and **Figure 16** show the results of both steps of the 2020 evaluation for Project Zones A and B, respectively. Neither of the project zones was compliant. As indicated in the 2013 BMAP, DEP assigns detailed allocations in project zones where compliance is not maintained.

**Table 23. Summary of seagrass compliance results, Step 1**

Step 1	North A	North B
2007 – 2013	Fail	Fail
2009 – 2015	Fail	Fail
2011 – 2017	Fail	Fail
2013 – 2019	Fail	Fail

**Table 24. Summary of seagrass compliance results, Step 2**

Note: Parentheses indicate number of years passing of those assessed for the compliance period of record.

Step 2	North A	North B
2007 – 2013	Fail (0 of 4)	Fail (0 of 4)
2009 – 2015	Fail (0 of 4)	Fail (0 of 4)
2011 – 2017	Fail (0 of 4)	Fail (0 of 4)
2013 – 2019	Fail (0 of 4)	Fail (0 of 4)

**Lapointe et al. 2020** reported that excessive nutrient loads during the rainy “wet season,” which coincides with the period of peak seagrass growth, causes phytoplankton HABs that reduced downwelling light levels ( $K_d$ ) below scientifically recognized thresholds known to support seagrass growth or seagrass ecosystem restoration. This study detailed the relationships of excess nitrogen loading from sewage, high water column ammonium concentrations, high levels of downwelling light attenuation ( $K_d$ ) to seagrasses, and biochemical evidence of light limitation to remaining seagrass tissue, indicating stress from low light availability that results in seagrass loss. Carbon isotope analysis, coupled with other

biochemical and environmental data indicate severe light limitation of seagrass growth, even in seagrasses that have survived mortality events during “super bloom” HABs or low dissolved oxygen events resulting from macroalgae and phytoplankton HABs. Furthermore, the current 2013 EPA-approved NNC for nitrogen concentrations found in the NIRL are an order of magnitude above maximum concentrations, reported in Lapointe et al. 2020, for sustaining growth of some seagrass species found in the Indian River Lagoon system. Excess nutrient concentrations reported for the IRL can be directly toxic or indirectly lethal to seagrasses in the IRL system. NNC for the IRL should be revised to address these effects on seagrasses.

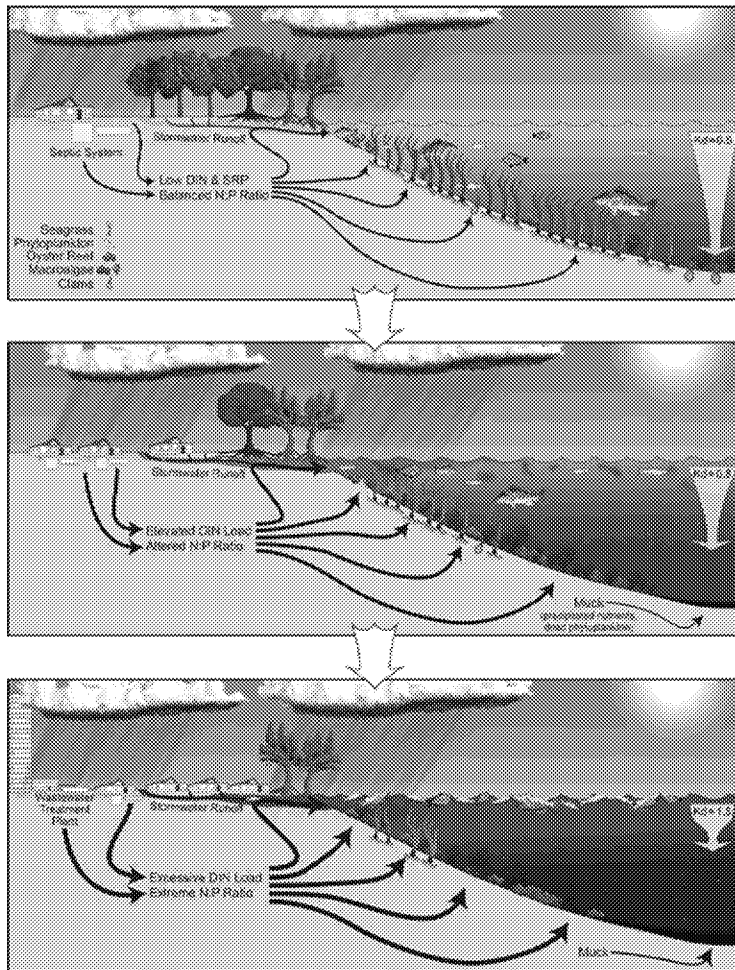


Figure from: Lapointe et al. (2020)

Escalating IRL eutrophication, resulting from low to elevated to excessive nutrient loads and the ecological consequences, including phytoplankton and macroalgae algal blooms, lower downwelling light, seagrass loss, fish kills and muck accumulations. Under elevated nutrient enrichment, the bottom of large portions of the IRL become a “dead zone” devoid of oxygen or light.

**4) The 2013 EPA-approved NNC for the IRL does not account for the confounding role of climate change driven nutrient loading and responses of IRL HABs and seagrass communities.**

In an invited presentation to then Gubernatorial candidate Congressman Ron DeSantis in August 2018, I provided the case study, based upon the peer-reviewed and published Barile (2018) article, on how human-induced climate change significantly increased nutrient loading into the Indian River Lagoon which resulted in a historically significant “brown tide” event in 2017-2018 and continued seagrass loss. Specifically, I described to the soon to be elected Governor how an intense Category 4 hurricane in September 2017 named Irma, strengthened by anthropogenically induced warming of the Caribbean Sea, resulted in storm conditions that caused the dumping of 30 million gallons of untreated sewage into an already beleaguered Indian River Lagoon. The direct nutrient loading from this event resulted in several tons of “new” nitrogen not accounted for in the EPA-NNC of FDEP TMDL.

In fact, climate change impacts are causing serious impacts to the sustainability of coastal estuaries for several reasons. Most directly, increasing human populations in watersheds results in increasing nutrient loading rates to estuaries such as the IRL. The population growth rate in east-central Florida is one of the fastest in the US, conferring necessary re-estimates of non-point source nutrient loading to the IRL. Increased nutrient loading rates should be updated in FDEP TMDL models as increasing human population density occurs in the IRL BMAP watersheds. Other climate change related phenomena in the southeast US, include warming temperatures in aquatic ecosystems, increased precipitation resulting from more intense and frequent tropical storms and hurricanes and El Nino/La Nina cycling, increase in stochastic rainfall events resulting in increased nutrient loading to Florida’s estuaries. Further, warming water temperatures, increased aquatic ecosystem acidification, and consequently, increased dissolved CO<sub>2</sub> in aquatic systems, etc. all confer advantages to HABs and disadvantages to seagrass communities, further confounding the calibration of NNCs/TMDLs. As increased stochastic nutrient loading to the IRL system continues and increasing periodicity and intensity of HABs have occurred since the 2013 EPA NNC approval, the scientific community has taken notice and reported the following.

**Sinha et al. (2017)** reported that climate change induced increases in precipitation in the US will increase nutrient loading to coastal waters in the 21<sup>st</sup> century by 19%. Offsetting this increase will require a 33% reduction in nitrogen loads, presenting a significant management challenge.

**Phlips et al (2020)** reported how increases in intensity and frequency of El Nino events and hurricanes, resulting in increased precipitation and nutrient loads, and have subsequently increased HAB events in the IRL system.

**Phlips et al. (2021)** reported that over the past 23 years of record, an increase in physical factors, such as El Nino cycling and tropical storm events has resulted in increased nutrient concentrations, and an ecological “regime shift” with a dramatic increase in peak biomass of phytoplankton HABs that has coincided with seagrass loss in the Indian River Lagoon system.

**Barile (2018)** reported that recent intense rainfall events have resulted in significant mobilization of human wastewater from OSDS in the IRL BMAP watersheds and from wastewater treatment plant dumping into the IRL, both increasing nutrient loadings and resulting increased incorporation of wastewater nutrients into macroalgal HABs in the IRL system.

**Referenced literature:**

Badrazzaman M. et al. 2012. Sources of nutrients impacting surface waters in Florida: a review. *J. Env. Mgmt.* 109: 80-92.

Barile PJ 2018. Widespread sewage pollution of the Indian River Lagoon system, Florida (USA) resolved by spatial analyses of macroalgal biogeochemistry. *Marine Pollution Bulletin* 128, 557-574.

FDEP 2021. BMAP for the Northern Indian River Lagoon.  
[https://publicfiles.dep.state.fl.us/DEAR/BMAP/IndianRiverLagoon/BMAP\\_Documents/2021\\_IRL\\_BMAP\\_Final/NIRL/Final\\_NIRL\\_BMAP20210216.pdf](https://publicfiles.dep.state.fl.us/DEAR/BMAP/IndianRiverLagoon/BMAP_Documents/2021_IRL_BMAP_Final/NIRL/Final_NIRL_BMAP20210216.pdf)

Herren LW et al. 2021. Septic systems drive nutrient enrichment of groundwaters and eutrophication in the urbanized Indian River Lagoon, FL. *Marine Pollution Bulletin* 172: 112928.

Kang Y, Koch, F, Gobler, CJ. 2015. The interactive roles of nutrient loading and zooplankton grazing in facilitating the expansion of harmful algal blooms caused by the pelagophyte *Aureoumbra lagunensis* to the Indian River Lagoon, USA. *Harmful Algae* 49: 162-173.

Lapointe BE, LW Herren, DD Debortoli, MA. Vogel. 2015. Evidence of sewage-driven eutrophication and harmful algal blooms in Florida's Indian River Lagoon. *Harmful Algae* 43: 82-102.

Lapointe BE, Herren LW, Paule AL. 2017. Septic systems contribute to nutrient pollution and harmful algal blooms in the St. Lucie Estuary, SE Florida, USA. *Harmful Algae* 70: 1-22

Lapointe BE, Herren LW, Brewton RA and P Alderman. 2020. Nutrient over-enrichment and light limitation of seagrass communities in the Indian River Lagoon, and urbanized subtropical estuary. *Science Total Environment*. 699: 134068.

Phlips, EJ et al. 2020. Hurricanes, El Nino and harmful algal blooms in two sub-tropical Florida estuaries: direct and indirect impacts. ***Nature Research*** 10: 1910.

Phlips EJ et al. 2021. Cyclical patterns and a regime shift in the character of phytoplankton blooms in a restricted sub-tropical lagoon, Indian River Lagoon, FL, US. ***Front. Mar. Sci.*** 8: 730934.

Sinha E et al. 2017. Eutrophication will increase during the 21<sup>st</sup> century as a result of precipitation changes. ***Science*** 357(6349): 405-408.

SJRWMD 1993. OSDS Problem Area Index for Brevard County. Technical document. July 1993.

University of Florida- Institute of Food and Agricultural Science. 2022.  
<https://water.ifas.ufl.edu/septic-systems/>

Whitehouse L and BE Lapointe. 2015. Comparative ecophysiology of bloom forming macroalgae in the Indian River Lagoon, FL. *Ulva lactuca*, *Hypnea musciformis*, and *Gracilaria tikvahiae*. ***J. Exp. Mar. Biol. Ecol.*** 471: 208-216.

## **EXHIBIT 2**



February 7, 2022

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***VIA ELECTRONIC AND CERTIFIED MAIL***

**Re: Sixty-Day Notice of Violations of the Endangered Species Act for Failing to Reinitiate Consultation Concerning Water Pollution in the Indian River Lagoon and Effects on Species Under National Marine Fisheries Service Jurisdiction**

Dear Officials of the U.S. Environmental Protection Agency:

On behalf of Center for Biological Diversity, Defenders of Wildlife, and Save the Manatee Club, we hereby provide notice in accordance with the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), that the U.S. Environmental Protection Agency ("EPA") is in violation of the ESA for failing to reinitiate consultation under ESA section 7, *id.* § 1536, concerning water quality in the Indian River Lagoon and its effect on species under the jurisdiction of the National Marine Fisheries Service ("NMFS"). Specifically, EPA has unlawfully failed to reinitiate section 7 consultation with NMFS in light of significant new information undermining EPA and NMFS's conclusions that the current estuary-specific numeric nutrient criteria are not likely to adversely affect any federally listed species or their critical habitats, including the threatened green turtle, the threatened loggerhead turtle, the endangered smalltooth sawfish, and the threatened Johnson's seagrass.

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On December 20, 2021, we provided notice that EPA is in violation of the ESA for failing to reinitiate consultation with the U.S. Fish and Wildlife Service (“FWS”) in light of the recent catastrophic die-off of manatees in the Indian River Lagoon caused by nutrient pollution.<sup>1</sup> We explained that new evidence shows that the current estuary-specific numeric nutrient criteria suffer from lax enforcement, an inappropriately long trajectory to achieve compliance, and a failure to account for the impact of legacy pollution. Recent scientific evidence shows that this same pollution currently devastating the manatee causes tumors in green and loggerhead turtles, contributes to loss of key habitat for the smalltooth sawfish, and is leading to the disappearance of Johnson’s seagrass. EPA must therefore reinitiate consultation with NFMS to address the harms from nutrient pollution to these species.

## **I. LEGAL BACKGROUND**

### **A. EPA’s Obligations in Approving Water Quality Standards under the Clean Water Act**

The Clean Water Act (“CWA”) was enacted almost 50 years ago to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.” Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, codified as amended at 33 U.S.C. §§ 1251–1387 (2013) (the “Clean Water Act”). To achieve this goal, the CWA requires states to set water quality standards protective of public health and the environment, 33 U.S.C. § 1313(c), and to develop pollution budgets known as “total maximum daily loads” (“TMDLs”) for each pollutant impairing a waterbody, *id.* § 1313(d); 40 C.F.R. § 130.2(i). These TMDLs set a numeric target reflecting the maximum amount of the pollutant that a waterbody can contain and still be considered in compliance with water quality standards. 33 U.S.C. § 1313(d).

EPA oversees Florida’s development of water quality standards and TMDLs. *Id.* § 1313(c)(3), (d)(2). Pursuant to guidance implementing EPA’s CWA regulations, EPA is to carefully review the adequacy of TMDLs, including ensuring that the TMDLs have a margin of safety to account for lack of knowledge concerning the relationship between load and wasteload allocations and water quality and that the TMDLs provide “reasonable assurances” that point and nonpoint source control measures will achieve the expected load reductions.<sup>2</sup>

### **B. EPA’s Consultation Obligations under the ESA**

Congress enacted the Endangered Species Act in 1973 to provide “a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “a program for the conservation of such endangered species and threatened species.” 16

<sup>1</sup> See Letter from Center for Biological Diversity et al. to EPA re Sixty-Day Notice of Violations of the Endangered Species Act for Failing to Reinitiate Consultation Concerning the Unusual Mortality Event for Manatees in the Indian River Lagoon (Dec. 20, 2021).

<sup>2</sup> See EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 (May 20, 2002), *available at* [https://www.epa.gov/sites/default/files/2015-10/documents/2002\\_06\\_04\\_tmdl\\_guidance\\_final52002.pdf](https://www.epa.gov/sites/default/files/2015-10/documents/2002_06_04_tmdl_guidance_final52002.pdf) (last visited Nov. 30, 2021).

U.S.C. § 1531(b). The statute contains an array of provisions designed to afford imperiled species “the highest of priorities,” so that they can recover to the point where federal protection is no longer needed. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

Section 7(a)(2) of the ESA imposes on federal agencies such as EPA a substantive duty to ensure that actions they authorize or carry out—including approval of a state’s water quality standards—are not likely to jeopardize listed species or destroy or adversely modify critical habitat designated for such species. 16 U.S.C. § 1536(a)(2); *see also* Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act, 66 Fed. Reg. 11202 (Feb. 22, 2001) (“EPA & NMFS MOU”). Such “action agencies” must discharge this obligation in consultation with the appropriate expert fish and wildlife agency—NMFS in the case of the green and loggerhead turtles, the smalltooth sawfish, and Johnson’s seagrass. *See id.*; 50 C.F.R. § 402.01(b). If the action agency determines its action may adversely affect listed species or critical habitat, it must initiate formal consultation with NMFS. 50 C.F.R. § 402.14(a). If the action agency determines, with written concurrence of NMFS, that the proposed action is not likely to adversely affect any listed species or critical habitat, the action agency need not initiate formal consultation. *Id.* § 402.13(c).

The ESA also requires that consultation be reinitiated in certain circumstances where “discretionary Federal involvement or control over the action has been retained or is authorized by law.” 50 C.F.R. § 402.16. With regards to state water quality standards, EPA has continuing discretionary involvement and control under 33 U.S.C. § 1313(c)(4)(B), which allows it to revise water quality standards “in any case where the [EPA] Administrator determines that a revised or new standard is necessary to meet the requirements of [the Clean Water Act].” *See also* EPA & NMFS MOU at 11206 (“EPA and the Services have agreed that where information indicates an existing standard is not adequate to avoid jeopardizing listed species, or destroying or adversely modifying designated critical habitat, EPA will work with the State/Tribe to obtain revisions in the standard or, if necessary, revise the standards through the promulgation of federal water quality standards under section 303(c)(4)(B) of the CWA.”); *Wild Fish Conservancy v. United States Env’t Prot. Agency*, 331 F. Supp. 3d 1210, 1222–26 (W.D. Wash. 2018) (finding that EPA retains discretionary involvement and control over approved water quality standards for the purposes of reinitiating consultation). Reinitiation of consultation is required:

- (1) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or
- (4) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16(a).

## II. HISTORY OF INDIAN RIVER LAGOON WATER QUALITY STANDARDS AND ESA CONSULTATION

On June 13, 2012, Florida submitted revised water quality standards for EPA’s approval under 33 U.S.C. § 1313(c). *See* Decision Document of United States Environmental Protection Agency Determination Under § 303(c) of the Clean Water Act, Review of Amendments to Florida’s Rule 62-302 and 62-303 (Nov. 30, 2012) (approving Fla. Admin. Code Ann. r. 62-302.531). EPA approved the revisions on November 30, 2012. *Id.* The revisions included a rule adopting a framework for developing criteria to numerically interpret the existing statewide narrative nutrient criterion that “in no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna.” *Id.* at 18. The framework explains that where a site-specific nutrient analysis has been performed for a particular waterbody—including through development of a total maximum daily load—this site-specific analysis will be considered the applicable numeric interpretation of the narrative criterion for a particular waterbody. *Id.*; Fla. Admin. Code Ann. r. 62-302.531. For the Indian River Lagoon and its constituent Banana River Lagoon, Florida’s Department of Environmental Protection (“FDEP”) set TMDLs for nitrogen, phosphorus, and dissolved oxygen in 2009. *See* FDEP, TMDL Report, Nutrient and Dissolved Oxygen TMDLs for the Indian River and Banana River Lagoon (Mar. 2009). EPA approved these TMDLs as the numeric nutrient criteria on July 29, 2013, and they are codified as the “Estuary-Specific Numeric Interpretations of the Narrative Nutrient Criterion” under Fla Admin. Code r. 62-302.532(aa) (referencing Fla Admin. Code r. 62-304.520 (Indian River Lagoon TMDLs)).

Pursuant to section 7 of the ESA, EPA consulted with NMFS—as well as with the FWS<sup>3</sup>—multiple times under 50 C.F.R. § 402.13 on its approval of Florida’s water quality standards.<sup>4</sup> NMFS concluded that EPA’s approval of the estuary-specific numeric nutrient criteria would not likely jeopardize any species under NMFS jurisdiction.<sup>5</sup>

## III. NEW INFORMATION REQUIRES REINITIATION OF CONSULTATION

Three significant pieces of new information underscore the requirement for EPA to reinitiate consultation with NMFS under 50 C.F.R. § 402.16 on Florida’s estuary-specific numeric nutrient criteria. First, new information indicates harm to the green and loggerhead turtles, the smalltooth sawfish, and Johnson’s seagrass, due to deterioration in water quality resulting from continuing nitrogen and phosphorus pollution in the Indian River Lagoon, calling into question the overall adequacy of the current TMDLs. Second, new information demonstrates there is a lack of reasonable assurance that the current measures to reduce point and nonpoint source pollution will achieve expected load reductions. Third, new information indicates that the

<sup>3</sup> *See* Letter from Center for Biological Diversity et al. to EPA re Sixty-Day Notice of Violations of the Endangered Species Act for Failing to Reinitiate Consultation Concerning the Unusual Mortality Event for Manatees in the Indian River Lagoon (Dec. 20, 2021) (detailing FWS consultation history).

<sup>4</sup> *See* National Marine Fisheries Service, Biological Opinion on EPA Approval of Water Quality Standards Under Section 303 of the Clean Water Act 3–4 (July 29, 2016) (detailing consultation history with NMFS).

<sup>5</sup> *See id.* at 186.

current TMDLs do not adequately take into account pollution from legacy muck, and therefore do not contain an adequate margin of safety. Finally, new information suggests that the TMDLs underestimated the role of septic systems and climate change in nutrient loading in the Indian River Lagoon and that the TMDLs are therefore inadequate to prevent harmful algal blooms.

**A. New Information Demonstrates Harm to Green and Loggerhead Turtles, Smalltooth Sawfish, and Johnson's Seagrass Due to Continuing Deterioration in Water Quality**

Manatees are not the only species suffering from the collapse of the Indian River Lagoon. Nutrient pollution causes harm to green and loggerhead turtles, smalltooth sawfish, and Johnson's seagrass. EPA must therefore reinitiate consultation with NMFS to consider whether the current water quality standards are adequate to protect these species.

**1. Green Turtle (*Chelonia mydas*) and Loggerhead Turtle (*Caretta caretta*)**

Green turtles (*Chelonia mydas*) were listed under the Endangered Species Act on July 28, 1978, with breeding populations in Florida and along the Pacific Coast of Mexico listed as endangered and all other populations listed as threatened.<sup>6</sup> In 2007, 11 distinct population segments ("DPS") were identified by NMFS and FWS, and in 2015 the listing status of each DPS was reevaluated. The North Atlantic DPS is now listed as threatened and includes the green turtle population that resides in the Indian River Lagoon.<sup>7</sup> "Historically, green turtles were exploited for their fat, meat and eggs, causing global population declines."<sup>8</sup> Bycatch, direct harvest, vessel strikes, loss of nesting habitat, pollution, climate change and disease continue to plague the species.<sup>9</sup> The Indian River Lagoon serves as an important foraging and developmental habitat for juvenile turtles in this DPS, and "[d]evelopmental habitats require the same intensity of protection as nesting beaches. If we fail to protect these habitats and their juvenile turtle residents, there will be no need to preserve nesting beaches."<sup>10</sup>

Loggerhead turtles (*Caretta caretta*) were listed as threatened throughout their range under the Endangered Species Act on July 28, 1978.<sup>11</sup> In 2011, the listing was revised to reflect nine DPSs. Five DPSs were listed as endangered and four were listed as threatened. Loggerhead turtles found in the Indian River Lagoon are in the Northwest Atlantic Ocean DPS which is listed

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<sup>6</sup> Seminoff et al., Status Review of the Green Turtle (*Chelonia mydas*) Under the Endangered Species Act (March 2015).

<sup>7</sup> *Id.*

<sup>8</sup> NOAA, Green Turtle (*Chelonia mydas*), available at <https://www.fisheries.noaa.gov/species/green-turtle> (last visited Jan. 6, 2022).

<sup>9</sup> *Id.*

<sup>10</sup> Zug and Glor, Estimates of Age and Growth in a Population of Green Sea Turtles (*Chelonia mydas*) from the Indian River lagoon system, Florida: A Skeletochronological Analysis (Aug. 1998); NOAA, Green Turtle (*Chelonia mydas*), available at <https://www.fisheries.noaa.gov/species/green-turtle> (last visited Jan. 6, 2022).

<sup>11</sup> NOAA, Loggerhead Turtle (*Caretta caretta*), available at <https://www.fisheries.noaa.gov/species/loggerhead-turtle> (last visited Jan. 10, 2022).

as threatened.<sup>12</sup> Threats to loggerheads include pollution, bycatch, loss of nesting habitat, vessel strikes, direct harvest, and climate change.<sup>13</sup> The Indian River Lagoon provides important developmental habitat for loggerhead subadults.<sup>14</sup>

One of the greatest threats to the green turtles in the Indian River Lagoon is the debilitating effects of fibropapillomatosis, “a chronic and often lethal tumor-forming disease in sea turtles.”<sup>15</sup> It is characterized by tumor growth that occurs on the skin, eyes, conjunctiva, and visceral organs. The severity of the disease is determined by the size and location of the tumor growths, with mobility and organ function frequently impeded, leading to the stranding of turtles on beaches and subsequent death.<sup>16</sup> Since “[c]ancers have the potential to drive already threatened wildlife towards extinction” fibropapillomatosis is an exceptionally concerning issue<sup>17</sup>—so much so that the National Oceanic and Atmospheric Administration (NOAA) and FWS convened an expert workshop in 2017 to determine how to deal with the high prevalence of tumors in Florida turtles and the resulting high mortality rate.<sup>18</sup> Unfortunately, the workshop addressed current ineffective rehabilitation practices without addressing the root cause of the issue.

A 2021 study found a recent increase in the prevalence of fibropapillomatosis in green turtles, with the prevalence of fibropapillomatosis in the Indian River Lagoon particularly high.<sup>19</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Ehrhart, *Marine Turtles of the Indian River Lagoon System* (1983).

<sup>15</sup> Van Houtan, et al., *Eutrophication and the Dietary Promotion of Sea Turtle Tumors* (Sep. 30, 2014).

<sup>16</sup> Herbst and Klein, *Green Turtle Fibropapillomatosis: Challenges to Assessing the Role of Environmental Cofactors* (1995); Perrault, et al., *Insights on Immune Function in Free-Ranging Green Sea Turtles (*Chelonia mydas*) with and without Fibropapillomatosis* (Mar. 18, 2021); Dujon, et al., *Sea Turtles in the Cancer Risk Landscape: A Global Meta-Analysis of Fibropapillomatosis Prevalence and Associated Risk Factors* (Oct. 8, 2021); Stacy, et al., *Report of the Technical Expert Workshop: Developing Recommendations for Field Response, Captive Management, and Rehabilitation of Sea Turtles with Fibropapillomatosis* (Sep. 6, 2017).

<sup>17</sup> Dujon, et al., *Sea Turtles in the Cancer Risk Landscape: A Global Meta-Analysis of Fibropapillomatosis Prevalence and Associated Risk Factors* (Oct. 8, 2021).

<sup>18</sup> Stacy, et al., *Report of the Technical Expert Workshop: Developing Recommendations for Field Response, Captive Management, and Rehabilitation of Sea Turtles with Fibropapillomatosis* (Sep. 6, 2017).

<sup>19</sup> Sposato, et al., *Evaluation of Immune Function in Two Populations of Green Sea Turtles (*Chelonia mydas*) in a Degraded versus a Nondegraded Habitat* (Oct. 2021); Herbst and Klein, *Green Turtle Fibropapillomatosis: Challenges to Assessing the Role of Environmental Cofactors* (1995); Perrault, et al., *Insights on Immune Function in Free-Ranging Green Sea Turtles (*Chelonia mydas*) with and without Fibropapillomatosis* (Mar. 18, 2021); Stacy, et al., *Report of the Technical Expert Workshop: Developing Recommendations for Field Response, Captive Management, and Rehabilitation of Sea Turtles with Fibropapillomatosis* (Sep. 6, 2017).

The article explained that there was a strong correlation between the increased numbers of green turtles suffering from tumors and eutrophication of coastal waters caused by nutrient pollution.<sup>20</sup>

It was originally thought that only green turtles acquire fibropapillomatosis but studies now show that all marine turtles, including the loggerhead turtle, are susceptible to these debilitating tumors, “raising concerns about disease impacts on these species.”<sup>21</sup> Fibropapillomatosis is not widely researched in loggerhead turtles and its exact impact on loggerhead turtle populations is not fully understood, but the tumors are associated with heavily polluted coastal waters in all turtles.<sup>22</sup> It can therefore be assumed that the effects of fibropapillomatosis could be equally detrimental to the loggerhead turtle in the Indian River Lagoon. EPA must therefore reinitiate consultation with NMFS to consider new information demonstrating harm to green and loggerhead turtles from nutrient pollution in the Indian River Lagoon.

## 2. *Smalltooth sawfish (Pristis pectinata)*

Smalltooth sawfish (*Pristis pectinata*) were once commonly found in waters from Texas to North Carolina. Now they are only found in the waters of southern Florida, and it is thought that their population is less than 5% of its size at the time of European settlement.<sup>23</sup> This decline is due to bycatch and habitat loss, especially the loss of red mangrove habitats. NOAA listed the U.S. DPS of smalltooth sawfish as endangered in 2003.<sup>24</sup> It was the first marine fish to receive federal protection.<sup>25</sup>

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<sup>20</sup> Sposato, et al., Evaluation of Immune Function in Two Populations of Green Sea Turtles (*Chelonia mydas*) in a Degraded versus a Nondegraded Habitat (Oct. 2021); Van Houtan, et al., Land Use, Macroalgae, and a Tumor-Forming Disease in Marine Turtles (Sep. 29, 2010); Van Houtan, et al., Eutrophication and the Dietary Promotion of Sea Turtle Tumors (Sep. 30, 2014); Dujon, et al., Sea Turtles in the Cancer Risk Landscape: A Global Meta-Analysis of Fibropapillomatosis Prevalence and Associated Risk Factors (Oct. 8, 2021); Sposato, et al., Evaluation of Immune Function in Two Populations of Green Sea Turtles (*Chelonia mydas*) in a Degraded versus a Nondegraded Habitat (Oct. 2021).

<sup>21</sup> Herbst and Klein, Green Turtle Fibropapillomatosis: Challenges to Assessing the Role of Environmental Cofactors (1995); Aguirre and Lutz, Marine Turtles as Sentinels of Ecosystem Health: Is Fibropapillomatosis and Indicator (May 13, 2004).

<sup>22</sup> Aguirre and Lutz, Marine Turtles as Sentinels of Ecosystem Health: Is Fibropapillomatosis and Indicator (May 13, 2004).

<sup>23</sup> NMFS and NOAA, Smalltooth Sawfish Recovery Plan (*Pristis pectinata*) (Jan. 2009)

<sup>24</sup> *Id.*

<sup>25</sup> NOAA, Smalltooth Sawfish (*Pristis pectinate*), available at <https://www.fisheries.noaa.gov/species/smalltooth-sawfish> (last visited Jan. 10, 2022).

Sawfish rely primarily on red mangroves as nurseries.<sup>26</sup> Red mangroves are one of the primary mangrove species in the Indian River Lagoon.<sup>27</sup> Nurseries provide food for maturing sawfish as well as protection from predators.<sup>28</sup>

Mangrove loss worldwide has been catastrophic ranging from 20% to 35% since 1980, at a 1-8% rate of loss per year.<sup>29</sup> This rate of loss exceeds that of tropical rainforests and coral reefs.<sup>30</sup> The Indian River Lagoon alone has seen an 86% loss in its mangrove population since the 1940s.<sup>31</sup> “If special management needs aren’t addressed, the functional elimination of nurseries through habitat destruction could push populations [of smalltooth sawfish] to a tipping point where suitable nursery areas become a limiting factor to recovery.”<sup>32</sup> This is especially relevant in the Indian River Lagoon where the Florida Fish and Wildlife Conservation Commission states that a fisherman in the late 1800s caught 300 smalltooth sawfish in one season.<sup>33</sup> In comparison, only seven sawfish have been caught in the Indian River Lagoon since 2016.<sup>34</sup>

The loss of mangrove habitats is due primarily to anthropogenic threats including logging for timber and fuel, and removal for coastal development and aquaculture.<sup>35</sup> But research shows

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<sup>26</sup> Brame, et al., Biology, Ecology, and Status of the Smalltooth Sawfish *Pristis pectinata* in the USA (May 23, 2019); NMFS and NOAA, Smalltooth Sawfish Recovery Plan (*Pristis pectinata*) (Jan. 2009); Norton, et al., Designating Critical Habitat for Juvenile Endangered Smalltooth Sawfish in the United States (Aug. 13, 2012).

<sup>27</sup> SJWMD, Indian River Lagoon: An Introduction to a Natural Treasure (2007).

<sup>28</sup> Brame, et al., Biology, Ecology, and Status of the Smalltooth Sawfish *Pristis pectinata* in the USA (May 23, 2019); NMFS and NOAA, Smalltooth Sawfish Recovery Plan (*Pristis pectinata*) (Jan. 2009); Norton, et al., Designating Critical Habitat for Juvenile Endangered Smalltooth Sawfish in the United States (Aug. 13, 2012); Norton, et al., Designating Critical Habitat for Juvenile Endangered Smalltooth Sawfish in the United States (Aug. 13, 2012).

<sup>29</sup> Polidoro, et al., The loss of Species: Mangrove Extinction Risk and Geographic Areas of Global Concern (April 8, 2010); FAO, Status and Trends in Mangrove Area Extent Worldwide (Dec. 2003), available at <https://www.fao.org/3/j1533e/j1533e00.htm> (last visited Jan. 5, 2022); Valiela, et al., Mangrove Forests: One of the World’s Threatened Major Tropical Environments (Oct. 2001).

<sup>30</sup> Valiela, et al., Mangrove Forests: One of the World’s Threatened Major Tropical Environments (Oct. 2001).

<sup>31</sup> FDEP, Florida’s Mangroves (Feb. 11, 2021).

<sup>32</sup> Norton, et al., Designating Critical Habitat for Juvenile Endangered Smalltooth Sawfish in the United States (Aug. 13, 2012).

<sup>33</sup> FFWCC, General Information on Smalltooth Sawfish, available at <https://myfwc.com/research/saltwater/fish/sawfish/general-information/> (last visited Jan. 6, 2022).

<sup>34</sup> Galoustian, Endangered Juvenile Smalltooth Sawfish found in St. Lucie River (Nov. 19, 2020).

<sup>35</sup> Polidoro, et al., The loss of Species: Mangrove Extinction Risk and Geographic Areas of Global Concern (April 8, 2010); Valiela, et al., Mangrove Forests: One of the World’s Threatened Major Tropical Environments (Oct. 2001).

that mangroves are also sensitive to the effects of eutrophication. High nutrient water content causes an increase in above-ground production, creating an appearance of high productivity and proliferation, but this comes at the cost of root production. Without a solid root foundation, mangroves are at risk to changes in weather and habitat conditions.<sup>36</sup> Nutrient pollution may thus continue to exacerbate the loss of mangrove habitats in the Indian River Lagoon, causing further loss of habitat for the smalltooth sawfish. EPA must therefore reinitiate consultation with NMFS to consider new information suggesting that nutrient pollution in the Indian River Lagoon may be contributing to loss of habitat, or causing other harmful impacts, for the smalltooth sawfish.

### 3. *Johnson's Seagrass (Halophila johnsonii Eiseman)*

Johnson's Seagrass (*Halophila johnsonii Eiseman*) is a rare seagrass found only in lagoons on the east coast of Florida and was the first marine plant species to be listed under the ESA.<sup>37</sup> In the Indian River Lagoon, Johnson's seagrass is found between Sebastian and Jupiter Inlets.<sup>38</sup>

Eutrophication is considered "a major cause of seagrass disappearance worldwide."<sup>39</sup> Its impact has been highly detrimental on the seagrass in the Indian River Lagoon.<sup>40</sup> Seagrass loss in the Indian River Lagoon has been disastrous with a 58% loss in the last decade.<sup>41</sup> Phytoplankton blooms caused by high nutrient loads resulted in "a 95% loss of seagrass cover" between 2011 and 2017 in the northern and central segments of the Indian River Lagoon.<sup>42</sup> Johnson's Seagrass is especially susceptible to the effects of these blooms.<sup>43</sup> EPA must therefore reinitiate consultation with NMFS to consider new information suggesting that nutrient pollution in the Indian River Lagoon may be contributing the loss of Johnson's seagrass.

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<sup>36</sup> Lovelock, et al., Nutrient Enrichment Increases Mortality of Mangroves (May 19, 2009); Reef, et al., Nutrition of Mangroves (June 21, 2010).

<sup>37</sup> NMFS is currently reevaluating the listing status of Johnson's seagrass based on new genetic information suggesting it is not a unique taxon. *See* 86 Fed. Reg. 72,908 (Dec. 23, 2021). However, unless and until that process concludes in the delisting of Johnson's seagrass from the endangered species list, EPA and NMFS have a duty to ensure its protection.

<sup>38</sup> Dawes et al., Seagrass Biodiversity in the Indian River Lagoon (1995).

<sup>39</sup> Burkholder, et al., Seagrass and Eutrophication (2007); *see also* Schmdt, et al., Regional-Scale Effects of Eutrophication on Ecosystem Structure and Services of Seagrass Beds (2012); Herren, et al., Septic Systems Drive Nutrient Enrichment of Groundwaters and Eutrophication in the Urbanized Indian River Lagoon, Florida (Oct. 9, 2021).

<sup>40</sup> Herren, et al., Septic Systems Drive Nutrient Enrichment of Groundwaters and Eutrophication in the Urbanized Indian River Lagoon, Florida (Oct. 9, 2021); SJRWMD, Recognizing the Importance of Seagrass, Working to Improve Water Quality (Mar. 4, 2021).

<sup>41</sup> Moore, Can this Seagrass Restoration Method Work even Before Indian River Lagoon Gets Clean? (Oct. 7, 2021); *see also* Herren, et al., Septic Systems Drive Nutrient Enrichment of Groundwaters and Eutrophication in the Urbanized Indian River Lagoon, Florida (Oct. 9, 2021).

<sup>42</sup> Herren, et al., Septic Systems Drive Nutrient Enrichment of Groundwaters and Eutrophication in the Urbanized Indian River Lagoon, Florida (Oct. 9, 2021).

<sup>43</sup> NMFS and NOAA, Final Recovery Plan for Johnson's Seagrass (*Halophila johnsonii Eiseman*) (Sep. 2002).

**B. New Information Suggests a Lack of Reasonable Assurances that Point and Nonpoint Source Reductions Will Achieve Expected Load Reductions**

In addition to the recent information detailing harms to federally-protected species from nutrient pollution, a growing record of inadequate efforts to comply with and enforce existing water-quality safeguards also necessitates reinitiation of consultation. For EPA to approve a TMDL, EPA must determine that the TMDL provides reasonable assurances that point and nonpoint source control measures will achieve expected load reductions.<sup>44</sup> Lax enforcement and compliance for both point and nonpoint sources suggests that the current TMDLs are ineffective at controlling nutrients into the Indian River Lagoon. EPA must therefore reinitiate consultation to consider this new information suggesting that the current TMDLs are not being effectively implemented and that the TMDLs lack reasonable assurances they will achieve load reductions. *See* 50 C.F.R. § 402.16(a)(1), (3).

**1. Recent Reports Suggest Current Stormwater and Wastewater Treatment Facilities Fail to Meet the Presumption that they Achieve Expected Load Reductions**

Several recent reports indicate that point source control measures and enforcement are inadequate, suggesting that the TMDLs must be revisited to ensure that they provide reasonable assurances that the wasteload allocation from point sources will be achieved.

First, in 2019, a “Blue-green Algae Task Force,” appointed by Governor DeSantis to aid the Florida Department of Environmental Protection, concluded that “[t]he presumption that a stormwater treatment system constructed and permitted in compliance with [best management practice] design criteria will not cause or contribute to violations of surface water quality standards in adjacent and/or connected waterbodies has been evaluated and challenged. Available data suggest that a substantial number of stormwater treatment systems throughout the state fail to achieve their presumed performance standards.” Blue-green Algae Task Force, DRAFT consensus Document #1 Final Draft – Revised 3 October 2019. The Task Force recommended “the development and implementation of a stormwater system inspection and monitoring program with the goal of identifying improperly functioning and/or failing systems so that corrective action can be taken to reduce nutrient pollution and other negative environmental impacts.” *Id.* It further recommended “that stormwater design criteria be revised and updated to incorporate recent advances in stormwater treatment technologies and other practices that have demonstrated environmental benefits; nutrient reduction specifically.” *Id.*

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<sup>44</sup> *See* 40 C.F.R. 122.44(d)(1)(vii)(B) (requiring effluent limits in permits be consistent with “the assumptions and requirements of any available wasteload allocation” in an approved TMDL); EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 at 4 (May 20, 2002), *available at* [https://www.epa.gov/sites/default/files/2015-10/documents/2002\\_06\\_04\\_tmdl\\_guidance\\_final52002.pdf](https://www.epa.gov/sites/default/files/2015-10/documents/2002_06_04_tmdl_guidance_final52002.pdf) (last visited Nov. 30, 2021) (explaining that when waters are impaired by both point and nonpoint sources, “the TMDL should provide reasonable assurances that nonpoint source control measures will achieve expected load reductions in order for the TMDL to be approvable”).

Second, a 2018 review of sewage pollution in the Indian River Lagoon suggested that harmful algae outbreaks are initiated and expanded by wet weather discharges from municipal wastewater treatment facilities. *See* Barile, Widespread Sewage Pollution of the Indian River Lagoon System, Florida (USA) Resolved by Spatial Analyses of Macroalgal Biogeochemistry, *Marine Pollution Bulletin* 128 (2018). The article explained that although direct surface water discharges of treated human wastewater effluent are prohibited, up to 90 days per year of “emergency wet weather” surface discharges are allowed when significant rain events overload the treatment system capacities. *Id.* at 559; *see also* Indian River Lagoon Act, Chapter 90-262 Laws of Florida, Sec. 2(c) (allowing wet weather discharges). The article posits that these poorly reported wet weather discharges—which can be several million liters per day per treatment plant during wet season events—may be a key factor supporting harmful algal outbreaks. Barile at 560, 572. The article suggests that significant wastewater treatment infrastructure upgrades, including conversion of municipal wastewater treatment plants to high nutrient removal advanced wastewater treatment, as well as mandatory septic-to-sewer conversion, are needed for seagrass regrowth in the Indian River Lagoon. *Id.* at 572.<sup>45</sup>

Finally, a 2020 Florida Public Employees for Environmental Responsibility (“Florida PEER”) report disclosed that Brevard County had 38 instances of unpermitted sewage discharges, totaling 552,040 gallons discharged. *See* Florida PEER, Report on Enforcement Efforts by the Florida Department of Environmental Protection (2020), *available at* <https://www.peer.org/2020-florida-enforcement-report/> (last visited Dec. 1, 2021). Florida PEER also reported that the Florida Department of Environmental Protection conducted fewer inspections in 2020 than in previous years, and that the severity of fines decreased. Moreover, “the enforcement actions used by the FDEP were largely short-form consent orders that required nothing more than paying a penalty, i.e., the traffic ticket approach.” *Id.* at 35. As Florida PEER Director Jerry Phillips explained, “[r]ather than seeking major reductions in our pollution load, DEP’s reliance on small fines makes pollution an acceptable cost of doing business.” *See* Florida PEER, Press Release, Florida Pollution Enforcement Fell into Covid Coma, (Sep. 15, 2021) *available at* <https://www.peer.org/florida-pollution-enforcement-fell-into-covid-coma/> (last visited Dec. 1, 2021). This information thus suggests that lax enforcement of unpermitted sewage discharges could be further contributing to nitrogen and phosphorous pollution in the Indian River Lagoon.<sup>46</sup>

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<sup>45</sup> *See also* Lapointe, et al., Evidence of Sewage-Driven Eutrophication and Harmful Algal Blooms in Florida’s Indian River Lagoon, 43 *Harmful Algae* 82–102 (March 5, 2015) (suggesting that seagrass loss due to pollution from sewage indicates the need for improved sewage collection and treatment).

<sup>46</sup> *See also* Waymer and Vazquez, Sewage spill keep taxing Indian River Lagoon, other waters; state issues fines, but is that enough?, *Florida Today* (Aug. 15, 2019). In late 2020, more than seven million gallons of raw sewage spilled into a pond at Sand Point Park that flows directly into the Indian River Lagoon, resulting in a fish die-off. *See* Vazquez, Protestors call for action in Titusville after raw sewage spill into Indian River Lagoon, *Florida Today* (Jan 9, 2021); Waymer, Titusville sewage fallout could top half a million, *Florida Today* (May 7, 2021).

EPA must thus reinitiate consultation with NMFS under 50 C.F.R. § 402.16 to take into consideration these recent reports demonstrating the lack of reasonable assurances that point source discharge control measures will achieve required load reductions.

**2. The TMDLs Lack Reasonable Assurances that the Agricultural Best Management Practices Designed to Control Nonpoint Source Pollution Are Sufficient and Achievable**

In addition to recent information indicating that point source discharge controls do not provide reasonable assurances that load reductions will be achieved, further new information suggests that nonpoint sources present an additional source of pollution that is inadequately addressed. Agricultural nonpoint sources are a significant contributor of nitrogen and phosphorous into the Indian River Lagoon. *See* FDEP, Central Indian River Lagoon Basin Management Action Plan 17 (Feb. 2021) (“CIRL BMAP”). To address these nonpoint sources, the FDEP has created three Basin Management Action Plans (“BMAPs”), dividing up the Indian River Lagoon into three subbasins: (1) the Central Indian River Lagoon; (2) the North Indian River Lagoon (“NIRL BMAP”); and (3) the Banana River Lagoon (“BRL BMAP”). These BMAPs include agricultural best management practices (“BMPs”) that are aimed at reducing nitrogen and phosphorus runoff from agricultural practices. Under Florida law, it is the agricultural landowner’s responsibility to implement the BMPs, and landowners who do not enroll in the BMP Program are supposed to be referred to FDEP for enforcement action.

Unfortunately, however, current landowner enrollment in the BMP program is very low: only 25% of agricultural acres are currently enrolled in the Central Indian River Lagoon, *see* CIRL BMAP at 153; only 6% are enrolled in the North Indian River Lagoon, *see* NIRL BMAP at 27; and 0% are enrolled in the Banana River Lagoon, *see* BRL BMAP at 22. This is far below the current average of 62% enrollment in the BMP Program statewide, and 82% enrollment of irrigated agricultural acres statewide. *See* Florida Department of Agriculture and Consumer Services, Office of Agricultural Water Policy, Status of Implementation of Agricultural Nonpoint Source Best Management Practices 2 (July 1, 2021). Moreover, although Florida Department of Agriculture and Consumer Services (“FDACS”) is required to verify that landowners are properly implementing BMPs, including by conducting site visits every two years, FDACS conducted relatively few site visits to the Indian River Lagoon in 2020: only 91 out of 2,824 total visits statewide. *See id.* at 17. Furthermore, of the more than 6,600 referrals statewide from FDACS to FDEP for enforcement for agricultural producers not following the rules, none have faced penalties.<sup>47</sup> As Florida Agricultural Commissioner Nikki Fried described the situation in August, 2021, “[u]nfortunately we have not seen a hammer come down from

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<sup>47</sup> *See* Chesnes, Ag Commissioner Nikki Fried wants boots on the ground to measure, reduce pollution, TCPalm (Aug. 4, 2021), *available at* <https://www.tcpalm.com/story/news/local/indian-river-lagoon/2021/08/04/nikki-fried-visits-sewalls-point-discuss-clean-water-initiative/5452933001/> (last visited Dec. 1, 2021).

FDEP. . . . There's a carrot and there's a stick. [FDACS] is the carrot, and FDEP is the stick. And the stick's not working.”<sup>48</sup>

Finally, although the BMAPs intend to increase enrollment over time, the BMAPs do not aim to achieve full targeted load reductions until 2035, *see, e.g.*, CIRL BMAP at 16. This lengthy trajectory, coupled with the currently low enrollment by agricultural landowners in the BMP Program and lack of meaningful enforcement, is inappropriate and insufficient given the current ecological collapse of the Indian River Lagoon. EPA must therefore reinstate consultation with NMFS to consider new information demonstrating that the current enrollment and enforcement of BMPs, and planned trajectory of nitrogen and phosphorus reductions, has been insufficient to prevent seagrass loss, and that there are presently insufficient assurances that the measures to reduce nonpoint source pollution in the TMDLs will achieve expected load reductions.

**C. New Information Suggests the TMDLs Overlook, and Should Take into Account, Ongoing Contributions of Nitrogen and Phosphorous from Legacy Pollution**

New information also highlights the important role that legacy pollution plays in the ecosystem collapse that is underway in the Indian River Lagoon, yet the existing TMDLs fail to account for this factor. Over time, the harmful levels of nutrients entering the Indian River Lagoon have led to muck accumulation on the lagoon bottom, which “fluxes” nutrients back into the lagoon. There are an estimated 5 million cubic yards of muck within the Indian River Lagoon, delivering roughly 30% of the total nutrient load.<sup>49</sup> Brevard County recently posited that “[n]itrogen and phosphorus released each year as muck decays are now larger than any current source of nutrient pollution to lagoon waters.” Tetra Tech, Inc. and CloseWaters LLC. (2021) Save Our Indian River Lagoon Project Plan 2021 Update for Brevard County, Natural Resources Management Department Brevard County, Florida. Not only does legacy muck contribute to nitrogen and phosphorus pollution, but it can result in resuspension of sediment which decreases

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<sup>48</sup> *Id.* *See also* MacLaughlin, Will Basin Management Action Plans Restore Florida's Impaired Waters?, 89 Fla. B. J. 31 (Feb. 2015) (suggesting that BMAPs “need more regulatory teeth if they are to succeed”); Blue-green Algae Task Force, DRAFT consensus Document #1 Final Draft – Revised (Oct. 3, 2019) (“[T]he [Blue-green Algae Task Force] recommends that the effectiveness of BMPs be supported by adequate data to justify the presumption of compliance granted upon enrollment and implementation”).

<sup>49</sup> Fox and Tefry, Lagoon-wide Application of the Quick-Flux Technique to determine Sediment Nitrogen and Phosphorus Fluxes, Submitted to Brevard County, Fl. Natural Resources Management Department (June 2019); *see also* Tetra Tech, Inc. and CloseWaters LLC., Save Our Indian River Lagoon Project Plan 2021 Update for Brevard County, Natural Resources Management Department Brevard County, Florida (Feb. 2021), *available at* <https://www.brevardfl.gov/SaveOurLagoon/ProjectPlan> (last visited on Dec. 1, 2021).

light availability to seagrass and further contributes to seagrass loss.<sup>50</sup> It can also cover the natural bottom of the lagoon so that the seagrass is unable to grow.<sup>51</sup>

EPA's TMDL guidance explains that TMDL submittals should identify all "point and nonpoint sources of the pollutant of concern, including the location of the source(s) and the quantity of the loading" in order for EPA to adequately review the load and wasteload allocations and develop an adequate margin of safety "to account for any lack of knowledge concerning the relationship between load and wasteload allocations and water quality." EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 at 1, 4 (May 20, 2002). But despite the outsize importance of this legacy muck as a pollution source, legacy inputs were not accounted for in the nitrogen and phosphorus TMDLs and the "Spatial Watershed Iterative Loading or 'SWIL' Model"—the model that calculates the load allocations for the Indian River Lagoon BMAPs—does not take this legacy muck into account. *See, e.g.*, NIRL BMAP at 39.

Without addressing legacy muck, it is likely that algal outbreaks and seagrass loss will continue.<sup>52</sup> EPA must therefore reinitiate consultation with NMFS in light of evidence that the current TMDLs lack an adequate margin of safety that takes into account the nutrient and sediment contributions of legacy pollution.

#### **D. New Information Suggests the TMDLs Underestimate the Role of Septic Systems and Climate Change in Nutrient Loading in the Indian River Lagoon**

The attached expert report by Dr. Peter Barile compiles additional new scientific evidence indicating that the current TMDLs in the Indian River Lagoon are insufficient at preventing harmful algal blooms and seagrass loss. Specifically, Dr. Barile's report explains that nutrient loads from septic tanks were underestimated in the approved numeric nutrient criteria and that they do not account for the confounding role of climate change in driving nutrient loading. He concludes that the current numeric nutrient criteria for nitrogen "are an order of magnitude above the maximum concentrations reported . . . for sustaining growth of some seagrass species found in the Indian River Lagoon system." Barile Report at 8. EPA must therefore reinitiate consultation in light of evidence that the current TMDLs are insufficient to protect ecosystem health in the Indian River Lagoon.

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<sup>50</sup> Philips, Factors Affecting the Abundance of Phytoplankton in a Restricted Subtropical Lagoon, The Indian River Lagoon, Florida, USA, Estuarine, Coastal and Shelf Science (Sep. 2002).

<sup>51</sup> Florida Tech, Florida Tech Scientists and Engineers Seek Answers for Muck in the Indian River Lagoon (Aug. 13, 2017); Waymer, Muck: The arch-enemy lurks deep in Indian River Lagoon – Muck problem expensive to solve, Florida Today (Nov. 24, 2013).

<sup>52</sup> *See* Missimer, et al., Legacy Phosphorus in Lake Okeechobee (Florida, USA) Sediments: A Review and New Perspective, Water (2021) (explaining that in Lake Okeechobee, "[d]espite major efforts to control external nutrient loading into the lake, the high frequency of algal blooms will continue until the muds bearing legacy nutrients are removed from the lake").

#### IV. CONCLUSION

The ESA authorizes citizen suits to enjoin violations of the ESA. 16 U.S.C. § 1540(g)(1)(a). As set forth above, EPA is in violation of the ESA for failing to reinstate formal consultation with NMFS concerning EPA's approval of Florida's estuary-specific numeric nutrient criteria in light of recent new information about harms to federally-protected species under NMFS jurisdiction and new information indicating that the current numeric nutrient standards are insufficient. If EPA is unwilling to take action within sixty days to reinstate consultation, we plan to seek redress through litigation.

Sincerely,

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## **Report on recent scientific evidence (post-2013) to compel the USEPA and FDEP to reassess Indian River Lagoon, FL Numerical Nutrient Criteria**

Peter Barile, Ph.D. Senior Scientist  
Marine Research & Consulting, Inc., Melbourne FL

This is an expert report by Peter Barile, Ph.D., Senior Scientist, Marine Research & Consulting, Inc. Melbourne, Florida, on the scientific description of the health of the Indian River Lagoon as it relates to the 2013 EPA-approved Numerical Nutrient Criteria for the Indian River Lagoon system, excess nutrient loading and concentrations, harmful algal blooms and subsequently to seagrasses die-off and loss of over 400 manatees in Brevard County in 2021.

Dr. Barile has a Ph.D. in Environmental Sciences, a Master of Science degree in Marine Biology and a Bachelor's degree in Biological Sciences, all from Florida Tech in Melbourne, FL. Dr. Barile is a former Link Foundation Post Doctoral Fellow in the Division of Marine Science at Harbor Branch Oceanographic Institution in Ft. Pierce, FL. and a former NOAA Sea Grant- Knauss Marine Policy Fellow with residence in the US federal government's executive branch on ocean policy development at the National Science Foundation in Washington, D.C. Dr. Barile has 30 years of experience as a scientist and has authored over 20 peer-reviewed scientific articles, book chapters and public policy documents largely on Florida aquatic ecosystems, including the Indian River Lagoon. He has been relied upon to give expert consultation and testimony to the Florida legislature on the role of land-based sources of pollution to Florida's aquatic ecosystems and served on the Florida Senate's Consumer Fertilizer Task Force.

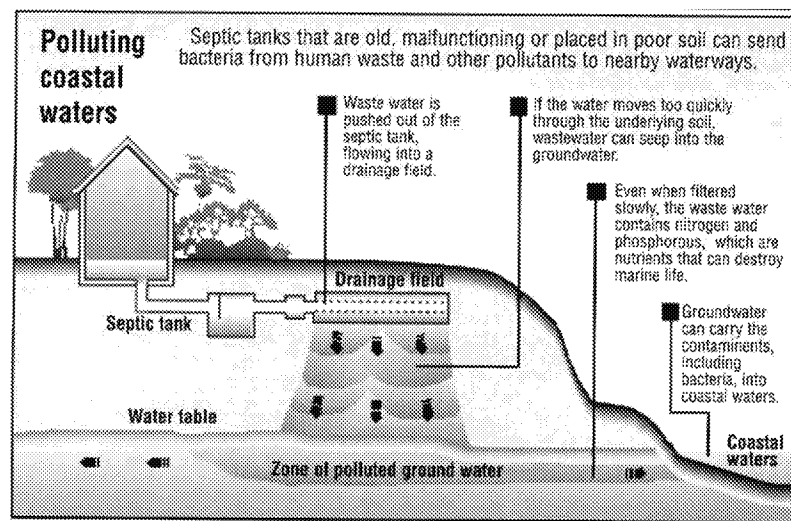
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This report addresses new scientific information that may be used to compel the US Environmental Protection Agency (EPA) under the Clean Water Act to require the Florida Department of Environmental Protection (FDEP) to reassess its Numerical Nutrient Criteria (NNC) for Impaired Waters of the Indian River Lagoon. This analysis includes new scientific evidence, since adoption of the 2013 EPA-approved NNC, revising the understanding of nutrient loading sources to the IRL system and processes that now confound the models used to create the IRL NNC. Since the EPA's adoption of the 2013 NNC, the FDEP's TMDL nutrient reduction

regulatory program has resulted in 1) annual nutrient load and nutrient concentration exceedances that have resulted in 2) unprecedented high density phytoplankton blooms, 3) a 95% loss of historic seagrass coverage in the northern Indian River Lagoon (NIRL), and 4) subsequent die-off of nearly 400 manatees in the NIRL BMAP/TMDL area during 2021.

### 1) Florida DEP underestimated the contribution of nutrient loads from septic tanks

Recent modeling work in Florida indicates that nutrient loading from septic tanks (OSDS) is the second largest nutrient loading source to Florida's aquatic ecosystems (Badruzzaman et al. 2012). The University of Florida's Institute of Food & Agricultural Sciences estimates that there are 2.6 million septic tanks in the state that discharge nearly 426 million gallons of wastewater per day into Florida's ground and surface waters (UF-IFAS 2022). Nearly 300,000 OSDS are in the counties along the IRL system. The widespread pollution of OSDS effluent into the IRL is supported by the hydrogeological properties of the surficial aquifer along the Lagoon that mobilizes effluent downgradient to the IRL's surface waters.



From: Barile and Lapointe (1999)

The EPA's NNC are based upon a NIRL BMAP nutrient load estimate that there are 16,171 residences within this watershed basin that utilize Onsite Sewage Disposal Systems (OSDS) or septic tanks for human waste water treatment (FDEP 2021).

This value may be an underestimate, as Brevard County alone has nearly 90,000 residences on septic tanks, where the SJRWMD (1993) estimated that nearly 70% may be “problem tanks” where changing environmental conditions may directly mobilize effluent to nearby surface or groundwaters beyond those available in the TMDL estimates for the central (CIRL) and northern (NIRL) Indian River Lagoon BMAP areas.

Barile (2018) estimated that 43% of the residences and a total of 91,630 residences utilize septic tanks for human sewage disposal in Brevard County. With flooding conditions associated with heavy wet weather and tropical storm activity, steady state models of septic tank effluent loading to adjacent surface waters, such as the SWIL model used in the FDEP’s NIRL BMAP nutrient loading estimates, are recognized to be conservative and an underestimate of this significant nutrient loading source.

In fact, a 2016 State of Florida South Florida Water Management District resolution (Resolution of the Governing Board #2016-0712, July 14, 2016) indicated that ***“human wastewater including septic tanks is the major source of excess nitrogen in the Indian River Lagoon and is underestimated in past nutrient loading models.”***

Figure 2 to the right is the 2021 FDEP BMAP of the residential septic systems (OSDS) in the NIRL watershed.

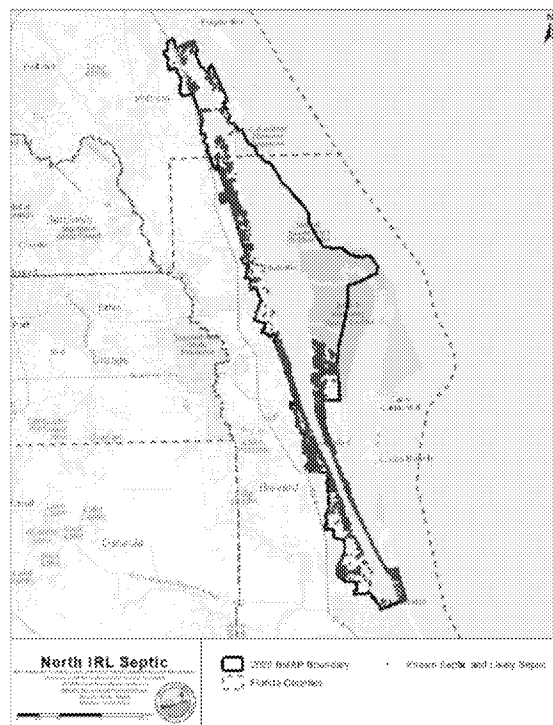


Figure 2. Location of septic systems in the NIRL.

The process of mobilization of septic tank (OSDS) effluent, as a previously underestimated and significant nutrient loading source to the Indian River Lagoon, has been documented recently in several published peer-reviewed academic journal contributions.

In the counties along the ~150 mile long lagoon, nearly 50% of the residences utilize OSDS for wastewater treatment (Barile, 2018), which is significantly higher than the Florida or US national average.

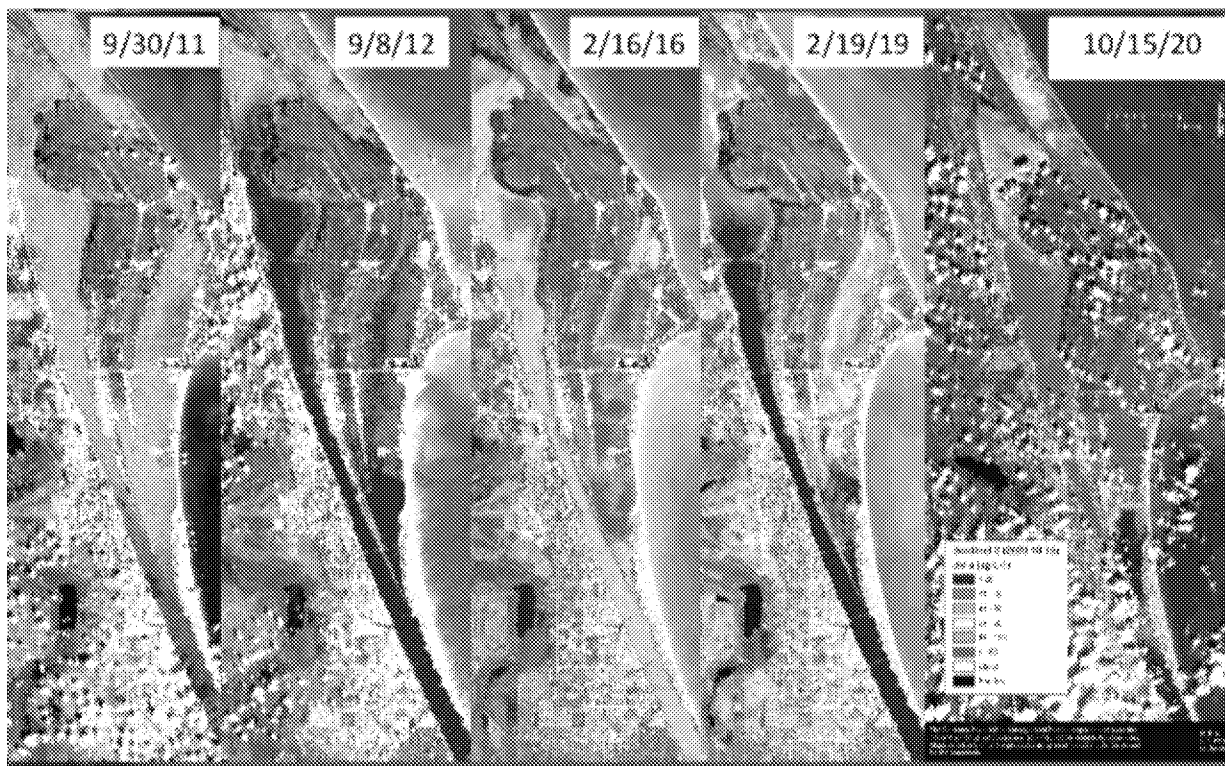
**Lapointe et al. (2017)** reported significantly high concentrations of septic tank (OSDS) inorganic nitrogen and phosphorus in groundwater monitor wells downgradient and adjacent to residential communities utilizing OSDS in the St. Lucie River, FL the primary tributary to the southern IRL. In adjacent surface waters evidence of significantly elevated wastewater nutrients were detected along with the conservative synthetic wastewater tracer, sucralose. Macroalgae and phytoplankton HAB blooms in both the St. Lucie River and southern Indian River Lagoon were enriched with OSDS wastewater nitrogen as a primary source, including the “green guacamole” *Microcystis* blooms that caused a public health crisis and international media attention in the summer of 2016.

**Herren et al. (2021)** reported the movement of septic tank (OSDS) effluent with high concentrations of reactive nitrogen and phosphorus into adjacent groundwaters and then into adjacent surface waters of the Sebastian River and Vero Beach lateral canal tributaries and into the CIRL. They traced OSDS as the dominant nitrogen source into macroalgae HABs in the downstream estuary. The study further used a conservative wastewater tracer, sucralose, as an additional line of evidence to trace OSDS loading from OSDS drainfields into adjacent ground and surface waters. There was significantly higher movement of OSDS nitrogen and phosphorus into adjacent ground and surface waters in the rainy “wet” season compared to the dry season.

**Lapointe et al. (2015)** reported wastewater nitrogen from OSDS as the primary loading source supporting macroalgae HABs at sites along the ~150 mi. IRL system. Sewage nitrogen from OSDS was also reported as a primary source of nitrogen supporting “super bloom” and “brown tide” phytoplankton blooms in the Indian River Lagoon. Total dissolved nitrogen and phosphorus concentrations were also measured above EPA’s NNC nutrient thresholds despite high concentration phytoplankton blooms and macroalgae blooms that should deplete water column nutrient concentrations.

**Kang et al. (2015)** reported for the 2012-2013 “brown tide” *Aureoumbra lagunensis* bloom event in the NIRL and Mosquito Lagoon that this HAB species was supported by a sewage nitrogen source from OSDS in the adjacent watersheds. This brown tide in 2012-2013 was a driver in the loss of ~95% of the seagrasses in the NIRL where the 2021 manatee UME occurred.

**Barile (2018)** documented widespread incorporation of wastewater nitrogen into macroalgal biomass at > 70 sites within tributaries and among the IRL system from Volusia to Palm Beach County. The study indicates that macroalgae HAB species incorporate elevated nitrogen and phosphorus from wastewater into their biomass more significantly during the rainy “wet season” when both elevated mobilization of nearby OSDS effluent sources and where dilapidate wastewater infrastructure either leaks or spills occur. Higher macroalgae tissue nitrogen contents in the rainy season also suggest that nitrogen loads are “externally” derived, and not supplied by “internal” cycling from the sediments or muck deposits.



SJRWMD (2021) Composite image of 2011-2020 HAB chlorophyll levels in the NIRL, all color shades lighter than blue (green, yellow, orange and red) are indicative of excessive HAB chlorophyll levels with higher concentrations from green to red. For reference, any shade darker than “purple” is an NNC exceedance. The HABs in “red” are >20x over the NNC concentration threshold for chlorophyll.

**2) The 2013 EPA NNC for the IRL may not be adequate to mitigate harmful algal blooms**

The northern and central IRL, Banana River and Mosquito River Lagoons, all “Impaired Waters” portions of the Indian River Lagoon system subject to Clean Water Act and subsequent EPA NNC regulatory action, experienced historically unprecedented and significant “Super blooms” of phytoplankton in 2011-2012 as the FDEP’s NNC & TMDL’s were going through review and adoption by the EPA. Since the adoption of the 2013 EPA-approved NNCs, nearly every rainy season since has caused excessive external nutrient loads (still ~50% above 2021 NIRL BMAP threshold nitrogen and phosphorus loading estimates) that have resulted in unprecedented phytoplankton and macroalgal HABs.

**Whitehouse and Lapointe 2015** reported that widespread macroalgae HABs, *Chaetomorpha* sp. and *Ulva* sp., in the NIRL that overgrow and shade out seagrasses as they have high uptake affinities for low levels of inorganic nitrogen and phosphorus. These macroalgae HAB species, through this physiological ecology study, are demonstrated to reach maximum photosynthetic rates (e.g. *Ulva* sp. doubling biomass every 2 days) at very low level nutrient concentrations, well below the 2013 EPA-approved NNC’s for nitrogen and phosphorus. This peer-reviewed scientific study concludes that the current NNC’s are not sufficient to limit HABs in the northern IRL where >95% seagrass die-off has occurred and >400 manatees died in 2021.

**3) The 2013 EPA-approved NNC for the IRL may not be adequate to mitigate seagrass die-off**

The process of seagrass loss in estuaries is directly related to water quality declines. Specifically, these processes have been well documented for the northern Indian River Lagoon. Lapointe et al. (2015) reported the relationship between human sewage nitrogen, blooms of phytoplankton and macroalgae cover and their relation to seagrass loss in the NIRL. The 2021 FDEP BMAP TMDL report for the NIRL has acknowledged the relationships between poor water quality and seagrass demise, and that water quality has been “non-compliant” to support seagrass growth since 2007, per the statement below.

***“The mean depth limits of seagrass coverage in the IRL decreased over the years because of changes in water quality resulting from anthropogenic influences. As polluted runoff reaches the Lagoon, it contributes to conditions that prevent the seagrass from growing in deeper water.”***

Since the 2013 BMAP, further evaluations of the seagrass depth limits in the NTRL have been conducted to reassess whether the NTRL project zones have continued to be compliant. **Table 23** and **Table 24** list the results of both steps of these evaluations since 2013, including the number of years that passed Step 2 of the evaluation. In 2020, the evaluation was conducted using the 2013, 2015, 2017, and 2019 seagrass mapping data, which were the latest datasets available at that time. **Figure 15** and **Figure 16** show the results of both steps of the 2020 evaluation for Project Zones A and B, respectively. Neither of the project zones was compliant. As indicated in the 2013 BMAP, DEP assigns detailed allocations in project zones where compliance is not maintained.

**Table 23. Summary of seagrass compliance results, Step 1**

Step 1	North A	North B
2007 – 2013	Fail	Fail
2009 – 2015	Fail	Fail
2011 – 2017	Fail	Fail
2013 – 2019	Fail	Fail

**Table 24. Summary of seagrass compliance results, Step 2**

Note: Parentheses indicate number of years passing of those assessed for the compliance period of record.

Step 2	North A	North B
2007 – 2013	Fail (0 of 4)	Fail (0 of 4)
2009 – 2015	Fail (0 of 4)	Fail (0 of 4)
2011 – 2017	Fail (0 of 4)	Fail (0 of 4)
2013 – 2019	Fail (0 of 4)	Fail (0 of 4)

**Lapointe et al. 2020** reported that excessive nutrient loads during the rainy “wet season,” which coincides with the period of peak seagrass growth, causes phytoplankton HABs that reduced downwelling light levels ( $K_d$ ) below scientifically recognized thresholds known to support seagrass growth or seagrass ecosystem restoration. This study detailed the relationships of excess nitrogen loading from sewage, high water column ammonium concentrations, high levels of downwelling light attenuation ( $K_d$ ) to seagrasses, and biochemical evidence of light limitation to remaining seagrass tissue, indicating stress from low light availability that results in seagrass loss. Carbon isotope analysis, coupled with other

biochemical and environmental data indicate severe light limitation of seagrass growth, even in seagrasses that have survived mortality events during “super bloom” HABs or low dissolved oxygen events resulting from macroalgae and phytoplankton HABs. Furthermore, the current 2013 EPA-approved NNC for nitrogen concentrations found in the NIRL are an order of magnitude above maximum concentrations, reported in Lapointe et al. 2020, for sustaining growth of some seagrass species found in the Indian River Lagoon system. Excess nutrient concentrations reported for the IRL can be directly toxic or indirectly lethal to seagrasses in the IRL system. NNC for the IRL should be revised to address these effects on seagrasses.

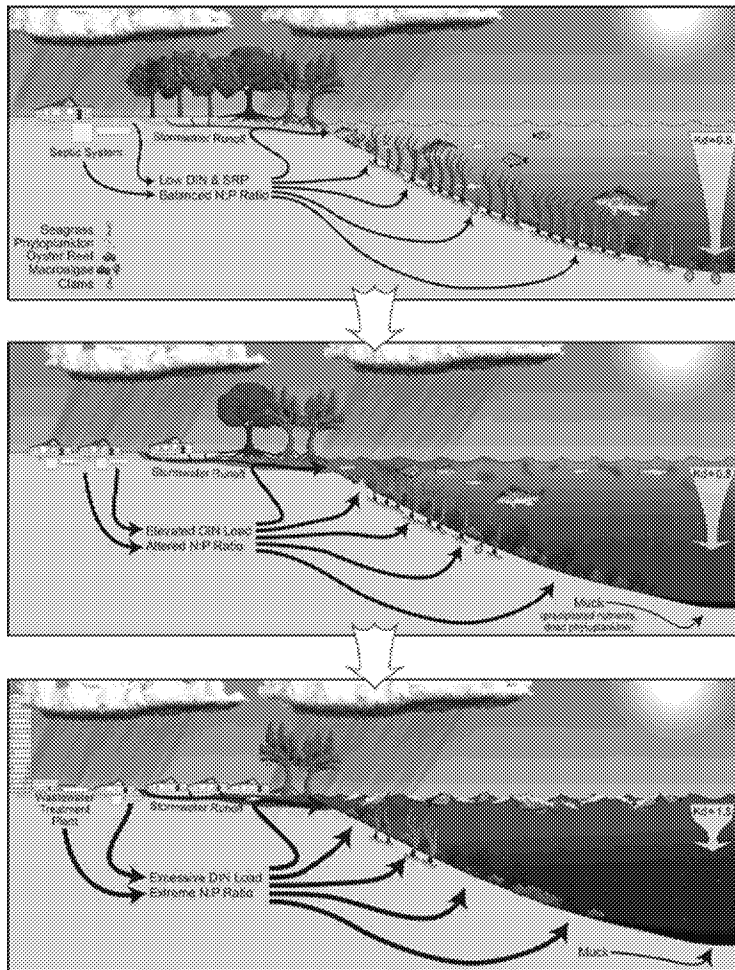


Figure from: Lapointe et al. (2020)

Escalating IRL eutrophication, resulting from low to elevated to excessive nutrient loads and the ecological consequences, including phytoplankton and macroalgae algal blooms, lower downwelling light, seagrass loss, fish kills and muck accumulations. Under elevated nutrient enrichment, the bottom of large portions of the IRL become a “dead zone” devoid of oxygen or light.

**4) The 2013 EPA-approved NNC for the IRL does not account for the confounding role of climate change driven nutrient loading and responses of IRL HABs and seagrass communities.**

In an invited presentation to then Gubernatorial candidate Congressman Ron DeSantis in August 2018, I provided the case study, based upon the peer-reviewed and published Barile (2018) article, on how human-induced climate change significantly increased nutrient loading into the Indian River Lagoon which resulted in a historically significant “brown tide” event in 2017-2018 and continued seagrass loss. Specifically, I described to the soon to be elected Governor how an intense Category 4 hurricane in September 2017 named Irma, strengthened by anthropogenically induced warming of the Caribbean Sea, resulted in storm conditions that caused the dumping of 30 million gallons of untreated sewage into an already beleaguered Indian River Lagoon. The direct nutrient loading from this event resulted in several tons of “new” nitrogen not accounted for in the EPA-NNC of FDEP TMDL.

In fact, climate change impacts are causing serious impacts to the sustainability of coastal estuaries for several reasons. Most directly, increasing human populations in watersheds results in increasing nutrient loading rates to estuaries such as the IRL. The population growth rate in east-central Florida is one of the fastest in the US, conferring necessary re-estimates of non-point source nutrient loading to the IRL. Increased nutrient loading rates should be updated in FDEP TMDL models as increasing human population density occurs in the IRL BMAP watersheds. Other climate change related phenomena in the southeast US, include warming temperatures in aquatic ecosystems, increased precipitation resulting from more intense and frequent tropical storms and hurricanes and El Nino/La Nina cycling, increase in stochastic rainfall events resulting in increased nutrient loading to Florida’s estuaries. Further, warming water temperatures, increased aquatic ecosystem acidification, and consequently, increased dissolved CO<sub>2</sub> in aquatic systems, etc. all confer advantages to HABs and disadvantages to seagrass communities, further confounding the calibration of NNCs/TMDLs. As increased stochastic nutrient loading to the IRL system continues and increasing periodicity and intensity of HABs have occurred since the 2013 EPA NNC approval, the scientific community has taken notice and reported the following.

**Sinha et al. (2017)** reported that climate change induced increases in precipitation in the US will increase nutrient loading to coastal waters in the 21<sup>st</sup> century by 19%. Offsetting this increase will require a 33% reduction in nitrogen loads, presenting a significant management challenge.

**Phlips et al (2020)** reported how increases in intensity and frequency of El Nino events and hurricanes, resulting in increased precipitation and nutrient loads, and have subsequently increased HAB events in the IRL system.

**Phlips et al. (2021)** reported that over the past 23 years of record, an increase in physical factors, such as El Nino cycling and tropical storm events has resulted in increased nutrient concentrations, and an ecological “regime shift” with a dramatic increase in peak biomass of phytoplankton HABs that has coincided with seagrass loss in the Indian River Lagoon system.

**Barile (2018)** reported that recent intense rainfall events have resulted in significant mobilization of human wastewater from OSDS in the IRL BMAP watersheds and from wastewater treatment plant dumping into the IRL, both increasing nutrient loadings and resulting increased incorporation of wastewater nutrients into macroalgal HABs in the IRL system.

**Referenced literature:**

Badrazzaman M. et al. 2012. Sources of nutrients impacting surface waters in Florida: a review. *J. Env. Mgmt.* 109: 80-92.

Barile PJ 2018. Widespread sewage pollution of the Indian River Lagoon system, Florida (USA) resolved by spatial analyses of macroalgal biogeochemistry. *Marine Pollution Bulletin* 128, 557-574.

FDEP 2021. BMAP for the Northern Indian River Lagoon.  
[https://publicfiles.dep.state.fl.us/DEAR/BMAP/IndianRiverLagoon/BMAP\\_Documents/2021\\_IRL\\_BMAP\\_Final/NIRL/Final\\_NIRL\\_BMAP20210216.pdf](https://publicfiles.dep.state.fl.us/DEAR/BMAP/IndianRiverLagoon/BMAP_Documents/2021_IRL_BMAP_Final/NIRL/Final_NIRL_BMAP20210216.pdf)

Herren LW et al. 2021. Septic systems drive nutrient enrichment of groundwaters and eutrophication in the urbanized Indian River Lagoon, FL. *Marine Pollution Bulletin* 172: 112928.

Kang Y, Koch, F, Gobler, CJ. 2015. The interactive roles of nutrient loading and zooplankton grazing in facilitating the expansion of harmful algal blooms caused by the pelagophyte *Aureoumbra lagunensis* to the Indian River Lagoon, USA. *Harmful Algae* 49: 162-173.

Lapointe BE, LW Herren, DD Debortoli, MA. Vogel. 2015. Evidence of sewage-driven eutrophication and harmful algal blooms in Florida's Indian River Lagoon. *Harmful Algae* 43: 82-102.

Lapointe BE, Herren LW, Paule AL. 2017. Septic systems contribute to nutrient pollution and harmful algal blooms in the St. Lucie Estuary, SE Florida, USA. *Harmful Algae* 70: 1-22

Lapointe BE, Herren LW, Brewton RA and P Alderman. 2020. Nutrient over-enrichment and light limitation of seagrass communities in the Indian River Lagoon, and urbanized subtropical estuary. *Science Total Environment*. 699: 134068.

Phlips, EJ et al. 2020. Hurricanes, El Nino and harmful algal blooms in two sub-tropical Florida estuaries: direct and indirect impacts. ***Nature Research*** 10: 1910.

Phlips EJ et al. 2021. Cyclical patterns and a regime shift in the character of phytoplankton blooms in a restricted sub-tropical lagoon, Indian River Lagoon, FL, US. ***Front. Mar. Sci.*** 8: 730934.

Sinha E et al. 2017. Eutrophication will increase during the 21<sup>st</sup> century as a result of precipitation changes. ***Science*** 357(6349): 405-408.

SJRWMD 1993. OSDS Problem Area Index for Brevard County. Technical document. July 1993.

University of Florida- Institute of Food and Agricultural Science. 2022.

<https://water.ifas.ufl.edu/septic-systems/>

Whitehouse L and BE Lapointe. 2015. Comparative ecophysiology of bloom forming macroalgae in the Indian River Lagoon, FL. *Ulva lactuca*, *Hypnea musciformis*, and *Gracilaria tikvahiae*. ***J. Exp. Mar. Biol. Ecol.*** 471: 208-216.

Message

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**From:** Amy Green [agreen@wmfe.org]  
**Sent:** 5/10/2022 4:35:29 PM  
**To:** Jenkins, Brandi [Jenkins.Brandi@epa.gov]  
**Subject:** FW: Lawsuit: EPA Must Protect Manatees From Water Pollution

Hi Brandi,

Does the EPA have any comment? Thanks!

Amy

---

**From:** Ragan Whitlock <rwhitlock@biologicaldiversity.org>  
**Sent:** Tuesday, May 10, 2022 10:44 AM  
**To:** Amy Green <agreen@wmfe.org>  
**Subject:** Lawsuit: EPA Must Protect Manatees From Water Pollution

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For Immediate Release, May 10, 2022

Contact: Elizabeth Forsyth, Earthjustice, (206) 531-0841, [eforsyth@earthjustice.org](mailto:eforsyth@earthjustice.org)  
Ragan Whitlock, Center for Biological Diversity, (727) 426-3653, [rwhitlock@biologicaldiversity.org](mailto:rwhitlock@biologicaldiversity.org)  
Patrick Rose, Save the Manatee Club, (850) 570-1373, [prose@savethemanatee.org](mailto:prose@savethemanatee.org)  
Jake Bleich, Defenders of Wildlife, (202) 772-3208, [jbleich@defenders.org](mailto:jbleich@defenders.org)

**Lawsuit: EPA Must Protect Manatees From Water Pollution**

***Hundreds Starved to Death in 2021 Because Unchecked Pollution is Killing Seagrass***

ORLANDO, Fla.— Three conservation groups sued the U.S. Environmental Protection Agency today for failing to protect manatees and sea turtles from water pollution in Florida.

Over half of the more than 1,000 manatee deaths in Florida in 2021 were attributable to starvation. The mass die-off is being caused by pollution-fueled algal blooms that have killed thousands of acres of seagrass in the Indian River Lagoon, highlighting the inadequacy of the state's federally approved water-quality standards.

Earthjustice is representing the Center for Biological Diversity, Save the Manatee Club and Defenders of Wildlife. Today's lawsuit, filed in federal court in the Middle District of Florida, pushes the court to require the EPA to reinitiate consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service under the Endangered Species Act to reassess its approval of Florida's water-quality standards for the Indian River Lagoon.

The Florida manatee is currently experiencing an officially declared unusual mortality event along Florida's east coast, which includes important manatee warm-water habitat like the Indian River Lagoon. The lagoon supports more species of plants and animals than any other estuary in North America.

"Manatees need clean water to live in — it's that simple," said Earthjustice attorney Elizabeth Forsyth. "The pollution in the Indian River Lagoon is preventable. We're asking EPA to step in and ensure the protection of the Indian River Lagoon and the species that depend on it."

Unchecked pollution in the Indian River Lagoon — stemming from wastewater-treatment discharges, leaking septic systems, fertilizer runoff and other sources — fuels algal blooms that kill seagrass and prevent it from growing back. Nearly a decade ago, the EPA approved the state's water-quality criteria for nitrogen and phosphorous, concluding the standards would not "adversely affect" manatees. New information, including the mass die-off of manatees in the lagoon, calls this conclusion into question.

"Hundreds of manatees are dying in the Indian River Lagoon as the water quality plummets, and the EPA must confront the massive nutrient pollution behind this disaster," said Ragan Whitlock, an attorney at the Center for Biological Diversity. "The existing water-quality standards just aren't strong enough to preserve this important ecosystem and save these amazing animals."

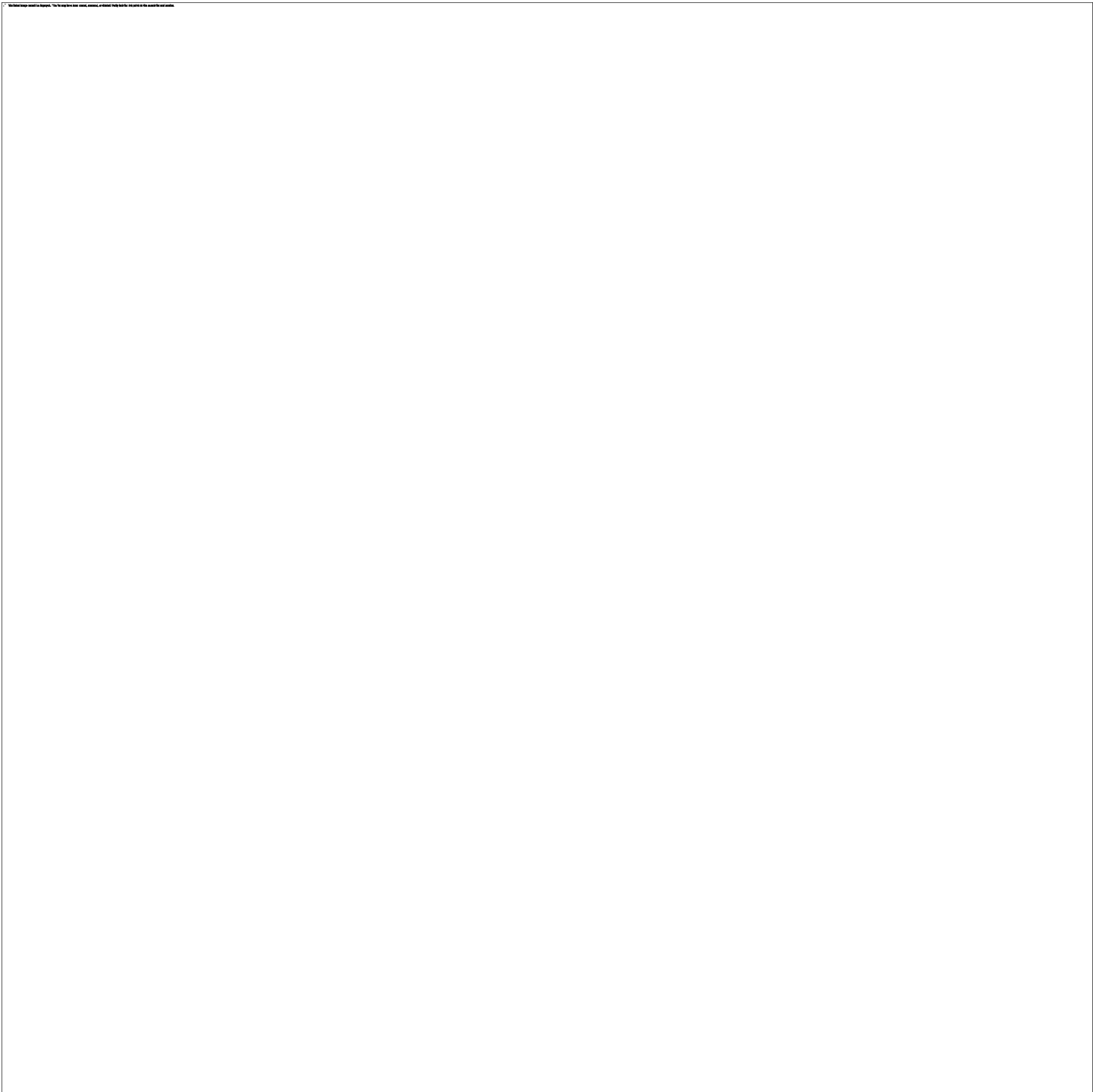
Florida's 2021 manatee deaths were more than double the average annual death rate over the previous five years. The number of deaths represents 19% of the Atlantic population of Florida manatees and 12.5% of all manatees in Florida.

"Florida's beloved manatees will continue to suffer and die as long as EPA maintains inadequate water quality standards," said Jane Davenport, senior attorney at Defenders of Wildlife. "There simply is no more time for EPA to waste in reinitiating consultation."

State and federal agency staff continued to witness high levels of malnourished and starving manatees throughout the winter of 2021-22, implementing a first-of-its-kind supplemental feeding program. In recent weeks the surrounding water has warmed, causing the manatees to disperse, and the program has been suspended. Unfortunately many manatees continue to suffer the long-term health consequences of starvation.

"Although nothing we do will bring back those nearly 1,000 manatees that suffered and died from years of neglect despite repeated warnings, we insist that the EPA join forces with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to ensure that improved water quality standards are expeditiously set and met to bring an end to this travesty," said Patrick Rose, an aquatic biologist and executive director of Save the Manatee Club, who has worked for over 45 years to help bring the species back from near extinction since it was first listed as endangered in 1967.

The U.S. Fish and Wildlife Service downlisted the manatee from endangered to threatened in 2017. Since then the species has suffered significant setbacks from habitat degradation, red tide, cold winters and now unprecedented mass starvation from the catastrophic seagrass die-off.



Florida manatee (*Trichechus manatus latirostrus*). Credit: Jim Reid, USFWS. Image is available for media use.

*The Center for Biological Diversity is a national, nonprofit conservation organization with more than 1.7 million members and online activists dedicated to the protection of endangered species and wild places.*

*Earthjustice, the nation's premier nonprofit environmental law organization, wields the power of law and the strength of partnership to protect people's health, to preserve magnificent places and wildlife, to advance clean energy, and to combat climate change. Because the earth needs a good lawyer.*

*Save the Manatee Club is an international nonprofit based in Florida with its mission to protect manatees and their aquatic habitat for future generations. The Club was founded in 1981 by former Florida Governor and U.S. Senator Bob Graham and singer-songwriter Jimmy Buffett to protect and advocate on behalf of the species.*

*Today, Save the Manatee Club is the world's leading manatee conservation organization. To learn more about the world's leading voice for manatees, visit [savethemanatee.org](http://savethemanatee.org)*

*Defenders of Wildlife is celebrating 75 years of protecting all native animals and plants in their natural communities. With a nationwide network of nearly 2.2 million members and activists, Defenders of Wildlife is a leading advocate for innovative solutions to safeguard our wildlife heritage for generations to come. For more information, visit [defenders.org/newsroom](http://defenders.org/newsroom) and follow us on Twitter [@Defenders](https://twitter.com/Defenders).*

If you would rather not receive future communications from Center for Biological Diversity, let us know by clicking [here](#).  
Center for Biological Diversity, P.O. Box 710, Tucson, AZ 85702 United States

Message

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**From:** Bruce Ritchie [britchie@politico.com]  
**Sent:** 1/30/2023 7:34:29 PM  
**To:** Jenkins, Brandi [Jenkins.Brandi@epa.gov]; Pinkney, James [Pinkney.James@epa.gov]  
**Subject:** Fw: Earthjustice news - FL still using illegal Trump wetlands definition  
**Attachments:** 2023 01 30 Earthjustice letter to EPA re FL continued unlawful application of NWPR.pdf

Do you have any comment on this letter, including the statement that EPA is allowing DEP to continue violating the law? Is DEP applying the outdated definition and is there another explanation for why that may be happening? Thanks.

From the letter:

*"EPA has allowed Florida to violate the law for too long. More than one year has passed since the court issued its decision in Pasqua Yaqui Tribe, and more than one year has passed since EPA notified DEP that it must apply the pre-2015 regulatory regime. And EPA has codified a new definition of waters of the United States, which Florida will no doubt delay in implementing for as long as possible. In the meantime, wetlands properly protected as waters of the United States are being destroyed across the state."*

Can you get back to me by 4? Thanks.

Bruce Ritchie  
POLITICO  
Florida environment and energy reporter  
850-385-1774 (land line, no texting)  
850-566-4518 (cell)  
britchie@politico.com  
Twitter: @bruceritchie

---

**From:** Julie Hauserman <JHauserman@earthjustice.org>  
**Sent:** Monday, January 30, 2023 12:08 PM  
**To:** Julie Hauserman <JHauserman@earthjustice.org>  
**Subject:** Earthjustice news - FL still using illegal Trump wetlands definition

**EXTERNAL SENDER:** Use caution with links and attachments.

Hi, More than a year ago, a court threw out the Trump administration's Waters of the United States (WOTUS) definition. But, inexplicably the DeSantis Administration is still using this illegal definition, which imperils Florida's wetlands.

**Today** Earthjustice sent the attached letter to the U.S. Environmental Protection Agency to once again warn that Florida is using an illegal definition of wetlands which need protection.

Florida's DEP is still using a vacated Trump administration rule that a federal court in Arizona threw out as illegal in August 2021 (Navigable Waters Protection Rule for Waters of the United States.) The Trump administration rule shrunk the amount of wetlands and waterways protected by the Clean Water Act in Florida and elsewhere. The rule now in place protects many more wetland acres.

- In September 2021, we alerted DEP to the federal court's decision, pointing out that the agency could not keep applying the illegal WOTUS rule. But DEP continued to apply it anyway.

- In October 2021, we alerted the court in our ongoing litigation over the state's wetlands permitting takeover scheme that Florida's continued use of an illegal WOTUS definition was only adding to the harm caused by DEP's illegal wetlands permitting program.
- In December 2021, EPA made clear to the state that Florida DEP could not continue using the illegal definition. But DEP hasn't stopped.
- In February 2022, we sent a letter to the Florida Chamber and the Association of Community developers, informing them that they face a liability risk using the illegal wetlands definition.
- Also, on a growing list of projects that will affect/destroy Florida wetlands, the DEP is making a determination that "no permit is required" – even when the actual current legal framework means those projects may require a permit. (Side note: under the current scheme, EPA is not getting notice of DEP's "no permit is required" determinations, so the EPA isn't able to comment or intervene to protect Waters of the United States.)

Earthjustice is representing the Center for Biological Diversity, Defenders of Wildlife, the Sierra Club, the Conservancy of Southwest Florida, the Florida Wildlife Federation, Miami Waterkeeper, and St. Johns Riverkeeper in a suit filed in Jan. 2021. The lawsuit – currently working its way through the courts - challenges the EPA's decision to let Florida take over wetlands permitting from the federal government. Among other things, the lawsuit alleges that in EPA's rush to push this through, the Trump administration skirted procedural requirements — failing even to make the state program legally effective.

**Contact: Christina Reichert** [creichert@earthjustice.org](mailto:creichert@earthjustice.org)

Julie Hauserman  
Earthjustice Outreach  
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[twitter.com/earthjustice](https://twitter.com/earthjustice)



*Because the earth needs a good lawyer*

Message

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**From:** Pinkney, James [Pinkney.James@epa.gov]  
**Sent:** 1/30/2023 8:49:40 PM  
**To:** Jenkins, Brandi [Jenkins.Brandi@epa.gov]  
**Subject:** FW: Earthjustice news - FL still using illegal Trump wetlands definition  
**Attachments:** 2023 01 30 Earthjustice letter to EPA re FL continued unlawful application of NWPR.pdf

How should we handle?

James

---

**From:** Bruce Ritchie <britchie@politico.com>  
**Sent:** Monday, January 30, 2023 2:34 PM  
**To:** Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>  
**Subject:** Fw: Earthjustice news - FL still using illegal Trump wetlands definition

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Bruce Ritchie

POLITICO

Florida environment and energy reporter

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**Contact:** Christina Reichert [creichert@earthjustice.org](mailto:creichert@earthjustice.org)

Julie Hauserman

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[twitter.com/earthjustice](https://twitter.com/earthjustice)



*Because the earth needs a good lawyer*

Message

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**From:** Marraccini, Davina [Marraccini.Davina@epa.gov]  
**Sent:** 2/13/2023 5:51:07 PM  
**To:** Lamberth, Larry [Lamberth.Larry@epa.gov]; Keefer, David [Keefer.David@epa.gov]; Wise, Allison [Wise.Allison@epa.gov]; Jenkins, Brandi [Jenkins.Brandi@epa.gov]; Pinkney, James [Pinkney.James@epa.gov]; Wilborn, Janay [Wilborn.Janay@epa.gov]  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

+ Brandi, James (Acting PGAS Section Chief) and JaNay (Govt liaison for FL) for awareness.

Does anyone know whether the state has requested EPA assistance?

---

**From:** Lamberth, Larry <Lamberth.Larry@epa.gov>  
**Sent:** Monday, February 13, 2023 12:48 PM  
**To:** Keefer, David <Keefer.David@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>; Marraccini, Davina <Marraccini.Davina@epa.gov>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Who's running point for you all ?

Thanks.

Larry

Larry L. Lamberth  
Deputy Director  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency  
14<sup>th</sup> Floor Sam Nunn Federal Center  
61 Forsyth Street  
Atlanta, Georgia 30303

Telephone: 404-562-8590  
Cell: 404-769-5583  
Fax: 404-562-8566

---

**From:** Kemker, Carol <Kemker.Carol@epa.gov>  
**Sent:** Monday, February 13, 2023 12:13 PM  
**To:** Lamberth, Larry <Lamberth.Larry@epa.gov>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Can you coordinate with SEMD on how to respond (or not) to this request?

---

**From:** Dominique Burkhardt <dburkhardt@earthjustice.org>  
**Sent:** Monday, February 13, 2023 12:07 PM  
**To:** Geis, Stacey <Geis.Stacey@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Oquendo, Ana (she/her/hers) <Oquendo.Ana@epa.gov>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Hoang, Anhthu <Hoang.Anhthu@epa.gov>; Vong, Suong <Vong.Suong@epa.gov>; Tsirigotis,

Peter <Tsirigotis.Peter@epa.gov>; Lassiter, Penny <Lassiter.Penny@epa.gov>

Cc: gina@floridarising.org; Kelli Thomas <kelli@floridarising.org>; MacKenzie Marcelin <mackenzie@floridarising.org>; sebastian@floridarising.org; Nestor Perez <nperez@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>; jjsmith@earthjustice.org

**Subject:** Urgent Response Needed Re. Fire at EPA-Regulated Incinerator




**Importance:** High

Good Afternoon,

We are writing to bring to your attention a massive fire that broke out yesterday at a municipal waste incinerator in a residential community in Doral, FL: the Miami-Dade County Resources Recovery Facility (address: 6990 NW 97th Avenue, Doral, FL 33178).

EPA maintains oversight of this facility under the Clean Air Act. The fire began around 2 p.m. yesterday, and though it has been contained somewhat, **it is ongoing, and it is expected that it will take days for firefighters to out the fire.** The apparent cause is that waste on a conveyor belt caught on fire.

Here is news coverage of the incident.

- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272447693.html>
- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272457138.html>
- <https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/>
- <https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/>
-  [processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4](#)
-  [processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4](#)
-  [original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4](#)

As you may be aware, Florida Rising has been opposed to this polluting waste incinerator in a residential community, calling for denial of the Title V air permit renewal via written comments and filing a civil rights complaint to EPA's Office of Civil Rights.

Now, community members in this environmental justice community face even more toxic exposure to air pollution from the billowing smoke from this fire, as they are forced to remain indoors and essentially protect themselves from this hazard. As part of its waste burning, this incinerator normally burns plastic and tires, and it is not prohibited from burning medical waste; as a result, the community is naturally fearful of what toxins they are now being exposed to from this fire.

**We are calling on EPA to act under its enforcement authority and its mandate to protect human health from these types of toxic exposures to:**

- 1) **Assist with immediately safeguarding the health of residents near this fire**, including evacuations and the shutting down of schools;
- 2) **Conduct a prompt, full, and independent investigation** into the cause of this fire, making the investigation results available to the public; and
- 3) **Order the facility operator, Covanta Energy, to cease operations at this source** indefinitely, and at least until the conclusion of an independent investigation and the determination by EPA that it is safe to resume operations at this facility.

Waste incinerators emit a host of toxic pollution that is harmful to people's health, and in Doral, in Florida, and in the United States, these facilities are predominantly in Black and brown communities. We are calling on EPA to act now,

while also facilitating the shutdown of these harmful facilities in favor of safer, and more sustainable waste management alternatives, such as the ones outlined in your agency's Zero Waste Toolkit.

Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
[www.earthjustice.org](http://www.earthjustice.org)



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Message

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**From:** Lamberth, Larry [Lamberth.Larry@epa.gov]  
**Sent:** 2/13/2023 7:03:25 PM  
**To:** Jenkins, Brandi [Jenkins.Brandi@epa.gov]; Marraccini, Davina [Marraccini.Davina@epa.gov]; Keefer, David [Keefer.David@epa.gov]; Wise, Allison [Wise.Allison@epa.gov]; Pinkney, James [Pinkney.James@epa.gov]; Wilborn, Janay [Wilborn.Janay@epa.gov]  
**CC:** Kemker, Carol [Kemker.Carol@epa.gov]  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Thank you!

Larry L. Lamberth  
Deputy Director  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency  
14<sup>th</sup> Floor Sam Nunn Federal Center  
61 Forsyth Street  
Atlanta, Georgia 30303

Telephone: 404-562-8590  
Cell: 404-769-5583  
Fax: 404-562-8566

---

**From:** Jenkins, Brandi <Jenkins.Brandi@epa.gov>  
**Sent:** Monday, February 13, 2023 2:01 PM  
**To:** Lamberth, Larry <Lamberth.Larry@epa.gov>; Marraccini, Davina <Marraccini.Davina@epa.gov>; Keefer, David <Keefer.David@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>; Wilborn, Janay <Wilborn.Janay@epa.gov>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

If I had scrolled all the way down, I would've seen the full incoming. Well, yes, we will handle the response.

Thanks!

Brandi

---

**From:** Lamberth, Larry <Lamberth.Larry@epa.gov>  
**Sent:** Monday, February 13, 2023 2:00 PM  
**To:** Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Marraccini, Davina <Marraccini.Davina@epa.gov>; Keefer, David <Keefer.David@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>; Wilborn, Janay <Wilborn.Janay@epa.gov>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Thanks. I assume you all are handling the response below? This was forwarded to us from OECA.

Thanks.

Larry

Larry L. Lamberth  
Deputy Director

Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency  
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**From:** Jenkins, Brandi <[Jenkins.Brandi@epa.gov](mailto:Jenkins.Brandi@epa.gov)>  
**Sent:** Monday, February 13, 2023 1:48 PM  
**To:** Marraccini, Davina <[Marraccini.Davina@epa.gov](mailto:Marraccini.Davina@epa.gov)>; Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>; Keefer, David <[Keefer.David@epa.gov](mailto:Keefer.David@epa.gov)>; Wise, Allison <[Wise.Allison@epa.gov](mailto:Wise.Allison@epa.gov)>; Pinkney, James <[Pinkney.James@epa.gov](mailto:Pinkney.James@epa.gov)>; Wilborn, Janay <[Wilborn.Janay@epa.gov](mailto:Wilborn.Janay@epa.gov)>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Yes. We have deployed an OSC and contractor support.

---

**From:** Marraccini, Davina <[Marraccini.Davina@epa.gov](mailto:Marraccini.Davina@epa.gov)>  
**Sent:** Monday, February 13, 2023 12:51 PM  
**To:** Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>; Keefer, David <[Keefer.David@epa.gov](mailto:Keefer.David@epa.gov)>; Wise, Allison <[Wise.Allison@epa.gov](mailto:Wise.Allison@epa.gov)>; Jenkins, Brandi <[Jenkins.Brandi@epa.gov](mailto:Jenkins.Brandi@epa.gov)>; Pinkney, James <[Pinkney.James@epa.gov](mailto:Pinkney.James@epa.gov)>; Wilborn, Janay <[Wilborn.Janay@epa.gov](mailto:Wilborn.Janay@epa.gov)>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

+ Brandi, James (Acting PGAS Section Chief) and JaNay (Govt liaison for FL) for awareness.

Does anyone know whether the state has requested EPA assistance?

---

**From:** Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>  
**Sent:** Monday, February 13, 2023 12:48 PM  
**To:** Keefer, David <[Keefer.David@epa.gov](mailto:Keefer.David@epa.gov)>; Wise, Allison <[Wise.Allison@epa.gov](mailto:Wise.Allison@epa.gov)>; Marraccini, Davina <[Marraccini.Davina@epa.gov](mailto:Marraccini.Davina@epa.gov)>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Who's running point for you all ?

Thanks.

Larry

Larry L. Lamberth  
Deputy Director  
Enforcement and Compliance Assurance Division  
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Atlanta, Georgia 30303

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Cell: 404-769-5583

Fax: 404-562-8566

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**From:** Kemker, Carol <Kemker.Carol@epa.gov>

**Sent:** Monday, February 13, 2023 12:13 PM

**To:** Lamberth, Larry <Lamberth.Larry@epa.gov>

**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

**Importance:** High

Can you coordinate with SEMD on how to respond (or not) to this request?

---

**From:** Dominique Burkhardt <dburkhardt@earthjustice.org>

**Sent:** Monday, February 13, 2023 12:07 PM

**To:** Geis, Stacey <Geis.Stacey@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Oquendo, Ana (she/her/hers) <Oquendo.Ana@epa.gov>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Hoang, Anhthu <Hoang.Anhthu@epa.gov>; Vong, Suong <Vong.Suong@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Lassiter, Penny <Lassiter.Penny@epa.gov>

**Cc:** gina@floridarising.org; Kelli Thomas <kelli@floridarising.org>; MacKenzie Marcelin <mackenzie@floridarising.org>; sebastian@floridarising.org; Nestor Perez <nperez@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>; jsmith@earthjustice.org

**Subject:** Urgent Response Needed Re. Fire at EPA-Regulated Incinerator




**Importance:** High

Good Afternoon,

We are writing to bring to your attention a massive fire that broke out yesterday at a municipal waste incinerator in a residential community in Doral, FL: the Miami-Dade County Resources Recovery Facility (address: 6990 NW 97th Avenue, Doral, FL 33178).

EPA maintains oversight of this facility under the Clean Air Act. The fire began around 2 p.m. yesterday, and though it has been contained somewhat, **it is ongoing, and it is expected that it will take days for firefighters to out the fire.** The apparent cause is that waste on a conveyor belt caught on fire.

Here is news coverage of the incident.

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- <https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/>
- <https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/>
-  [processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4](#)
-  [processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4](#)
-  [original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4](#)

As you may be aware, Florida Rising has been opposed to this polluting waste incinerator in a residential community, calling for denial of the Title V air permit renewal via written comments and filing a civil rights complaint to EPA's Office of Civil Rights.

Now, community members in this environmental justice community face even more toxic exposure to air pollution from the billowing smoke from this fire, as they are forced to remain indoors and essentially protect themselves from this

hazard. As part of its waste burning, this incinerator normally burns plastic and tires, and it is not prohibited from burning medical waste; as a result, the community is naturally fearful of what toxins they are now being exposed to from this fire.

**We are calling on EPA to act under its enforcement authority and its mandate to protect human health from these types of toxic exposures to:**

- 1) **Assist with immediately safeguarding the health of residents near this fire**, including evacuations and the shutting down of schools;
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Message

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**Sent:** 2/13/2023 7:00:25 PM  
**To:** Jenkins, Brandi [Jenkins.Brandi@epa.gov]; Marraccini, Davina [Marraccini.Davina@epa.gov]; Keefer, David [Keefer.David@epa.gov]; Wise, Allison [Wise.Allison@epa.gov]; Pinkney, James [Pinkney.James@epa.gov]; Wilborn, Janay [Wilborn.Janay@epa.gov]  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

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Larry

Larry L. Lamberth  
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United States Environmental Protection Agency  
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**Sent:** Monday, February 13, 2023 1:48 PM  
**To:** Marraccini, Davina <Marraccini.Davina@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>; Keefer, David <Keefer.David@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>; Wilborn, Janay <Wilborn.Janay@epa.gov>  
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**Sent:** Monday, February 13, 2023 12:48 PM  
**To:** Keefer, David <Keefer.David@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>; Marraccini, Davina <Marraccini.Davina@epa.gov>

**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

**Importance:** High

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**Sent:** Monday, February 13, 2023 12:13 PM

**To:** Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>

**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

**Importance:** High

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**From:** Dominique Burkhardt <[dburkhardt@earthjustice.org](mailto:dburkhardt@earthjustice.org)>

**Sent:** Monday, February 13, 2023 12:07 PM

**To:** Geis, Stacey <[Geis.Stacey@epa.gov](mailto:Geis.Stacey@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>; Oquendo, Ana (she/her/hers) <[Oquendo.Ana@epa.gov](mailto:Oquendo.Ana@epa.gov)>; Freeman, Caroline <[Freeman.Caroline@epa.gov](mailto:Freeman.Caroline@epa.gov)>; Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Hoang, Anhthu <[Hoang.Anhthu@epa.gov](mailto:Hoang.Anhthu@epa.gov)>; Vong, Suong <[Vong.Suong@epa.gov](mailto:Vong.Suong@epa.gov)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Lassiter, Penny <[Lassiter.Penny@epa.gov](mailto:Lassiter.Penny@epa.gov)>

**Cc:** [gina@floridarising.org](mailto:gina@floridarising.org); Kelli Thomas <[kelli@floridarising.org](mailto:kelli@floridarising.org)>; MacKenzie Marcelin <[mackenzie@floridarising.org](mailto:mackenzie@floridarising.org)>; [sebastian@floridarising.org](mailto:sebastian@floridarising.org); Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>; [jjsmith@earthjustice.org](mailto:jjsmith@earthjustice.org)

**Subject:** Urgent Response Needed Re. Fire at EPA-Regulated Incinerator




**Importance:** High

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- <https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/>
- <https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/>
-  [processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4](#)
-  [processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4](#)
-  [original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4](#)

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Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt  
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Message

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**From:** Wise, Allison [Wise.Allison@epa.gov]  
**Sent:** 2/13/2023 7:57:35 PM  
**To:** Jenkins, Brandi [Jenkins.Brandi@epa.gov]  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

IS the statement below the approved one? I'll send to NG.

Allison

---

**From:** Jenkins, Brandi <Jenkins.Brandi@epa.gov>  
**Sent:** Monday, February 13, 2023 1:47 PM  
**To:** Freeman, Caroline <Freeman.Caroline@epa.gov>; Chaffins, Randall <Chaffins.Randall@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Zapata, Cesar <Zapata.Cesar@epa.gov>; Blevins, John (he/him/his) <Blevins.John@epa.gov>; Toney, Anthony <Toney.Anthony@epa.gov>; Johnson, Terry <Johnson.Terry@epa.gov>  
**Cc:** Blackman, Daniel <Blackman.Daniel@epa.gov>; Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; Nicholson, John <Nicholson.John@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Rubini, Suzanne <Rubini.Suzanne@epa.gov>; Nowell, Valerie <Nowell.Valerie@epa.gov>; Webster, James <Webster.James@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Also, for awareness. We are starting to see a bit of incoming on this and Jim and I worked on a statement this morning (see below). Rep. Mario Diaz-Balart (FL-26) has also sent a letter to Administrator Regan (see attached).

Allison and I will work with Randall and Jim on a communications strategy while we are in our current posture.

*In coordination with the state of Florida, EPA is responding to a request from Miami-Dade County Fire to provide air monitoring and sampling assistance, in support of their efforts to address the ongoing fire at the Miami-Dade County Resources Recovery Center. At this time, EPA is deploying an emergency responder with contractor support to the Miami-Dade area to assist with air monitoring efforts as impacts to the ambient air are assessed. We will keep you abreast of any updates.*

Brandi

---

**From:** Freeman, Caroline <Freeman.Caroline@epa.gov>  
**Sent:** Monday, February 13, 2023 12:38 PM  
**To:** Chaffins, Randall <Chaffins.Randall@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Zapata, Cesar <Zapata.Cesar@epa.gov>; Blevins, John (he/him/his) <Blevins.John@epa.gov>; Toney, Anthony <Toney.Anthony@epa.gov>; Johnson, Terry <Johnson.Terry@epa.gov>; Jenkins, Brandi <Jenkins.Brandi@epa.gov>  
**Cc:** Blackman, Daniel <Blackman.Daniel@epa.gov>; Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; Nicholson, John <Nicholson.John@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Rubini, Suzanne <Rubini.Suzanne@epa.gov>; Nowell, Valerie <Nowell.Valerie@epa.gov>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

FYI – For Situational Awareness

---

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Peter <Tsirigotis.Peter@epa.gov>; Lassiter, Penny <Lassiter.Penny@epa.gov>

Cc: gina@floridarising.org; Kelli Thomas <kelli@floridarising.org>; MacKenzie Marcelin <mackenzie@floridarising.org>; sebastian@floridarising.org; Nestor Perez <nperez@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>; jjsmith@earthjustice.org

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- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272447693.html>
- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272457138.html>
- <https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/>
- <https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/>
-  [processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4](#)
-  [processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4](#)
-  [original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4](#)

As you may be aware, Florida Rising has been opposed to this polluting waste incinerator in a residential community, calling for denial of the Title V air permit renewal via written comments and filing a civil rights complaint to EPA's Office of Civil Rights.

Now, community members in this environmental justice community face even more toxic exposure to air pollution from the billowing smoke from this fire, as they are forced to remain indoors and essentially protect themselves from this hazard. As part of its waste burning, this incinerator normally burns plastic and tires, and it is not prohibited from burning medical waste; as a result, the community is naturally fearful of what toxins they are now being exposed to from this fire.

**We are calling on EPA to act under its enforcement authority and its mandate to protect human health from these types of toxic exposures to:**

- 1) **Assist with immediately safeguarding the health of residents near this fire**, including evacuations and the shutting down of schools;
- 2) **Conduct a prompt, full, and independent investigation** into the cause of this fire, making the investigation results available to the public; and
- 3) **Order the facility operator, Covanta Energy, to cease operations at this source** indefinitely, and at least until the conclusion of an independent investigation and the determination by EPA that it is safe to resume operations at this facility.

Waste incinerators emit a host of toxic pollution that is harmful to people's health, and in Doral, in Florida, and in the United States, these facilities are predominantly in Black and brown communities. We are calling on EPA to act now,

while also facilitating the shutdown of these harmful facilities in favor of safer, and more sustainable waste management alternatives, such as the ones outlined in your agency's Zero Waste Toolkit.

Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
[www.earthjustice.org](http://www.earthjustice.org)



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Message

---

**From:** Keefer, David [Keefer.David@epa.gov]  
**Sent:** 2/13/2023 10:21:50 PM  
**To:** Jenkins, Brandi [Jenkins.Brandi@epa.gov]  
**CC:** Marraccini, Davina [Marraccini.Davina@epa.gov]; Lamberth, Larry [Lamberth.Larry@epa.gov]; Wise, Allison [Wise.Allison@epa.gov]; Pinkney, James [Pinkney.James@epa.gov]; Wilborn, Janay [Wilborn.Janay@epa.gov]; Webster, James [Webster.James@epa.gov]  
**Subject:** Re: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

I am out of pocket today.

I think Jim Webster had the lead.

Sent from my iPhone

On Feb 13, 2023, at 1:47 PM, Jenkins, Brandi <Jenkins.Brandi@epa.gov> wrote:

Yes. We have deployed an OSC and contractor support.

---

**From:** Marraccini, Davina <Marraccini.Davina@epa.gov>  
**Sent:** Monday, February 13, 2023 12:51 PM  
**To:** Lamberth, Larry <Lamberth.Larry@epa.gov>; Keefer, David <Keefer.David@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>; Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>; Wilborn, Janay <Wilborn.Janay@epa.gov>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

+ Brandi, James (Acting PGAS Section Chief) and JaNay (Govt liaison for FL) for awareness.

Does anyone know whether the state has requested EPA assistance?

---

**From:** Lamberth, Larry <Lamberth.Larry@epa.gov>  
**Sent:** Monday, February 13, 2023 12:48 PM  
**To:** Keefer, David <Keefer.David@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>; Marraccini, Davina <Marraccini.Davina@epa.gov>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Who's running point for you all ?

Thanks.

Larry

Larry L. Lamberth  
Deputy Director  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency  
14<sup>th</sup> Floor Sam Nunn Federal Center

61 Forsyth Street  
Atlanta, Georgia 30303

Telephone: 404-562-8590  
Cell: 404-769-5583  
Fax: 404-562-8566

---

**From:** Kemker, Carol <Kemker.Carol@epa.gov>  
**Sent:** Monday, February 13, 2023 12:13 PM  
**To:** Lamberth, Larry <Lamberth.Larry@epa.gov>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Can you coordinate with SEMD on how to respond (or not) to this request?

---

**From:** Dominique Burkhardt <dburkhardt@earthjustice.org>  
**Sent:** Monday, February 13, 2023 12:07 PM  
**To:** Geis, Stacey <Geis.Stacey@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Oquendo, Ana (she/her/hers) <Oquendo.Ana@epa.gov>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Hoang, Anhthu <Hoang.Anhthu@epa.gov>; Vong, Suong <Vong.Suong@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Lassiter, Penny <Lassiter.Penny@epa.gov>  
**Cc:** gina@floridarising.org; Kelli Thomas <kelli@floridarising.org>; MacKenzie Marcelin <mackenzie@floridarising.org>; sebastian@floridarising.org; Nestor Perez <nperez@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>; jjsmith@earthjustice.org  
**Subject:** Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Good Afternoon,

We are writing to bring to your attention a massive fire that broke out yesterday at a municipal waste incinerator in a residential community in Doral, FL: the Miami-Dade County Resources Recovery Facility (address: 6990 NW 97th Avenue, Doral, FL 33178).

EPA maintains oversight of this facility under the Clean Air Act. The fire began around 2 p.m. yesterday, and though it has been contained somewhat, **it is ongoing, and it is expected that it will take days for firefighters to out the fire.** The apparent cause is that waste on a conveyor belt caught on fire.

Here is news coverage of the incident.

1. <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272447693.html>
2. <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272457138.html>
3. <https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/>
4. <https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/>
5. [!\[\]\(1086f4cd3e9f62c91f557ee36febbff8\_img.jpg\) processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4](#)
6. [!\[\]\(ac1eebfcb1dd43819aabe4394a165573\_img.jpg\) processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4](#)

As you may be aware, Florida Rising has been opposed to this polluting waste incinerator in a residential community, calling for denial of the Title V air permit renewal via written comments and filing a civil rights complaint to EPA's Office of Civil Rights.

Now, community members in this environmental justice community face even more toxic exposure to air pollution from the billowing smoke from this fire, as they are forced to remain indoors and essentially protect themselves from this hazard. As part of its waste burning, this incinerator normally burns plastic and tires, and it is not prohibited from burning medical waste; as a result, the community is naturally fearful of what toxins they are now being exposed to from this fire.

**We are calling on EPA to act under its enforcement authority and its mandate to protect human health from these types of toxic exposures to:**

1. **Assist with immediately safeguarding the health of residents near this fire**, including evacuations and the shutting down of schools;
2. **Conduct a prompt, full, and independent investigation** into the cause of this fire, making the investigation results available to the public; and
3. **Order the facility operator, Covanta Energy, to cease operations at this source** indefinitely, and at least until the conclusion of an independent investigation and the determination by EPA that it is safe to resume operations at this facility.

Waste incinerators emit a host of toxic pollution that is harmful to people's health, and in Doral, in Florida, and in the United States, these facilities are predominantly in Black and brown communities. We are calling on EPA to act now, while also facilitating the shutdown of these harmful facilities in favor of safer, and more sustainable waste management alternatives, such as the ones outlined in your agency's Zero Waste Toolkit.

Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
[www.earthjustice.org](http://www.earthjustice.org)



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Message

---

**From:** Keefer, David [Keefer.David@epa.gov]  
**Sent:** 2/17/2023 8:43:50 PM  
**To:** Jenkins, Brandi [Jenkins.Brandi@epa.gov]  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

FYI, Earthjustice is requesting an enforcement action at Miami-Dade, ECAD is lead for R4 response.

---

**From:** Keefer, David  
**Sent:** Friday, February 17, 2023 3:42 PM  
**To:** Lamberth, Larry <Lamberth.Larry@epa.gov>; Rubini, Suzanne <Rubini.Suzanne@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>  
**Cc:** Hansen, Susan <Hansen.Susan@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Bingham, Kimberly <Bingham.Kimberly@epa.gov>; Chavez, Araceli <Chavez.Araceli@epa.gov>; Russo, Todd <Russo.Todd@epa.gov>; Chaffins, Randall <Chaffins.Randall@epa.gov>; Webster, James <Webster.James@epa.gov>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Everyone:

This is the latest update:

**NRC 1359872, Doral Florida Facility Fire, Doral, Dade County, Florida** - On 02/13, A City-owned, contractor-operated solid waste energy reclamation facility reportedly caught fire at one of the conveyor belt assemblies. The fire spread to three separate metal skinned buildings at the facility. Fire suppression was limited to defensive actions through the night. It is believed that the hazardous materials present at the facility were not involved in the fire at the early stages. An EPA R4 FOSC and Superfund Technical Assessment and Response Team (START) contractors mobilized with air monitoring and air sampling equipment to assist in a determination of what hazardous constituents are in the noxious smoke and may be affecting community health. EPA assets arrived on-site and integrated into Unified Command on 2/14. The fire still burns and heavy equipment mobilized to assist with suppression operations. Firefighting water is believed to be contained. Miami-Dade County Division of Environmental Resources Management (DERM) conducted runoff water sampling. EPA established air monitoring stations consisting of particulate monitors and toxic chemical monitors (carbon monoxide, hydrogen sulfide, volatile organic compounds (VOC). EPA also established air sampling stations consisting of total VOC, total polycyclic aromatic hydrocarbons (PAHs), asbestos, and Resource Conservation and Recovery Act (RCRA) metals samplers. An additional FOSC mobilized to assist with the operations. An EPA Environmental Justice Standard Report was generated and provided to the FOSC for use by Unified Command as needed. Demolition and fire extinguishment operations continue. Smoke is still impacting the surrounding communities. All EPA generated air monitoring data was provided to Unified Command (UC). UC is working on a communication plan and will issue the data summaries to the public. Air sampling data will be provided to UC once the results are received from the analytical laboratory. One FOSC is demobilizing today. The second FOSC will demobilize once the PRP industrial hygiene contractors are integrated into the air monitoring and air sampling operations.

**Update:** Significant process has been made on building demolition permitting access to the seat of the fire. EPA air monitoring and sampling operations continue. The industrial hygiene firm hired by the PRP arrived on-site early in the morning on 2/17. EPA participated in a press briefing and the City of Doral continued to recommend that residents impacted by the smoke stay indoors with windows closed (shelter-in-place).

Following is a narrative/talking points about the response:

**BACKGROUND:**

- On February 13, 2023, a City-owned, solid waste energy reclamation facility, operated by Covanta Holdings Corporation, caught fire at one of the conveyor belt assemblies.

- The fire spread to three separate buildings at the facility.
- Local Emergency Management Officials did not issue any evacuation orders.
- Responding to a request from Miami-Dade County, the U.S. Environmental Protection Agency mobilized an EPA Federal On-Scene Coordinator (FOSC) with contractor support to initiate air monitoring and air sampling operations.
- The EPA established air monitoring stations consisting of particulate monitors and toxic chemical monitors (carbon monoxide, hydrogen sulfide, volatile organic compounds (VOC)). The EPA also established air sampling stations consisting of total VOC, total polycyclic aromatic hydrocarbons (PAHs), and Resource Conservation and Recovery Act (RCRA) metals samplers.
- An additional FOSC mobilized to assist with air monitoring operations on February 14, 2023.
- Demolition and firefighting operations continue as of February 15, 2023; however, smoke continues to emanate from the burning facility.
- EPA continues air sample and air monitoring operations. One round of VOC samples and three rounds of PAH and RCRA metals samples have been collected to date.
- As of 02/15/2023, the fire is currently within a partially collapsed structure. Due to safety concerns no one is able to enter the building where the fire remains. Demolition of the partially collapsed structure has begun. Once demolition completed, final fighting activities can begin.

#### KEY POINTS:

- EPA operations at this time consists of air monitoring and sampling operations and provision of technical assistance and coordination with Miami-Dade County.
- There have been PM 2.5 exceedances which fall under the Unhealthy classification based on PM 2.5 Community Action Thresholds. Summary tables have been provided to ATSDR for review and provided to Unified Command. There have been low-level detections of VOCs, CO, and CL but nothing above action levels.
- Air sampling results (lab analysis) are pending.

---

**From:** Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>

**Sent:** Friday, February 17, 2023 3:02 PM

**To:** Rubini, Suzanne <[Rubini.Suzanne@epa.gov](mailto:Rubini.Suzanne@epa.gov)>; Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Newman, Keriema <[Newman.Keriema@epa.gov](mailto:Newman.Keriema@epa.gov)>

**Cc:** Hansen, Susan <[Hansen.Susan@epa.gov](mailto:Hansen.Susan@epa.gov)>; Palmer, Leif <[Palmer.Leif@epa.gov](mailto:Palmer.Leif@epa.gov)>; Keefer, David <[Keefer.David@epa.gov](mailto:Keefer.David@epa.gov)>; Bingham, Kimberly <[Bingham.Kimberly@epa.gov](mailto:Bingham.Kimberly@epa.gov)>; Chavez, Araceli <[Chavez.Araceli@epa.gov](mailto:Chavez.Araceli@epa.gov)>; Russo, Todd <[Russo.Todd@epa.gov](mailto:Russo.Todd@epa.gov)>

**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Likely. We need to come up to speed quickly, so I am copying our team as well as David.

Larry L. Lamberth  
Deputy Director  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency  
14<sup>th</sup> Floor Sam Nunn Federal Center  
61 Forsyth Street  
Atlanta, Georgia 30303

Telephone: 404-562-8590  
Cell: 404-769-5583  
Fax: 404-562-8566

---

**From:** Rubini, Suzanne <[Rubini.Suzanne@epa.gov](mailto:Rubini.Suzanne@epa.gov)>  
**Sent:** Friday, February 17, 2023 2:57 PM  
**To:** Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>; Newman, Keriema <[Newman.Keriema@epa.gov](mailto:Newman.Keriema@epa.gov)>  
**Cc:** Hansen, Susan <[Hansen.Susan@epa.gov](mailto:Hansen.Susan@epa.gov)>; Palmer, Leif <[Palmer.Leif@epa.gov](mailto:Palmer.Leif@epa.gov)>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

FYI – I think I response would need to come from ECAD.

---

**From:** Dominique Burkhardt <[dburkhardt@earthjustice.org](mailto:dburkhardt@earthjustice.org)>  
**Sent:** Friday, February 17, 2023 2:54 PM  
**To:** Palmer, Leif <[Palmer.Leif@epa.gov](mailto:Palmer.Leif@epa.gov)>; Rubini, Suzanne <[Rubini.Suzanne@epa.gov](mailto:Rubini.Suzanne@epa.gov)>; Hansen, Susan <[Hansen.Susan@epa.gov](mailto:Hansen.Susan@epa.gov)>  
**Cc:** Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Good Afternoon Mr. Palmer, Ms. Rubini, and Ms. Hansen:

I just left a voicemail for Mr. Palmer regarding the waste incinerator that has been on fire in Miami (Doral) since Sunday, in a residential community. Please see below our attempts at having EPA initiate an investigation into the cause of the fire – including any legal or permit violations – as soon as possible.

Thank you for your prompt attention to this matter,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
[www.earthjustice.org](http://www.earthjustice.org)



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---

**From:** Dominique Burkhardt  
**Sent:** Friday, February 17, 2023 2:40 PM  
**To:** [nowell.valerie@epa.gov](mailto:nowell.valerie@epa.gov)  
**Cc:** [wilson.saundi@epa.gov](mailto:wilson.saundi@epa.gov); Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Good Afternoon Ms. Nowell,

I am writing to bring to your attention a massive fire that broke out at a waste incinerator in Doral, Florida, that has been burning since Sunday. EPA is on site conducting air monitoring, and the readings are showing dangerous spikes in air quality that are harmful to people's health. Five days after the outbreak of this fire, people are still being ordered to remain indoors for their safety.

We are appreciative of EPA's immediate action to monitor the air quality; however, it is just as important that **an independent investigation** be carried out into the cause of this fire, so that any hazards or potential permit or legal violations can immediately be accounted for and addressed – and to prevent this type of hazard from endangering another community.

EPA's Office of Civil Rights had been aware of this incinerator because Earthjustice filed a civil rights complaint last March regarding this and other incinerators in the state. In the email below, ECRCO advised they were looking into the situation. We are writing to ask if an independent investigation can be carried out by R4, either independently or alongside other EPA divisions, such as ECRCO.

Thank you for your attention to this matter,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
[www.earthjustice.org](http://www.earthjustice.org)



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---

**From:** Vong, Suong <[Vong.Suong@epa.gov](mailto:Vong.Suong@epa.gov)>  
**Sent:** Tuesday, February 14, 2023 2:15 PM  
**To:** Dominique Burkhardt <[dburkhardt@earthjustice.org](mailto:dburkhardt@earthjustice.org)>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

**This message originated outside of Earthjustice. Please use caution before opening attachments or links.**

Thank you, Dominique, for bringing this matter to our attention. We are evaluating our options on this issue.

Suong Vong  
Team Lead, Office of External Civil Rights Compliance

Office of Environmental Justice and External Civil Rights  
U.S. Environmental Protection Agency  
Email: [vong.suong@epa.gov](mailto:vong.suong@epa.gov)

---

**From:** Dominique Burkhardt <[dburkhardt@earthjustice.org](mailto:dburkhardt@earthjustice.org)>

**Sent:** Monday, February 13, 2023 12:07 PM

**To:** Geis, Stacey <[Geis.Stacey@epa.gov](mailto:Geis.Stacey@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>; Oquendo, Ana (she/her/hers) <[Oquendo.Ana@epa.gov](mailto:Oquendo.Ana@epa.gov)>; Freeman, Caroline <[Freeman.Caroline@epa.gov](mailto:Freeman.Caroline@epa.gov)>; Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Hoang, Anhthu <[Hoang.Anhthu@epa.gov](mailto:Hoang.Anhthu@epa.gov)>; Vong, Suong <[Vong.Suong@epa.gov](mailto:Vong.Suong@epa.gov)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Lassiter, Penny <[Lassiter.Penny@epa.gov](mailto:Lassiter.Penny@epa.gov)>

**Cc:** [gina@floridarising.org](mailto:gina@floridarising.org); Kelli Thomas <[kelli@floridarising.org](mailto:kelli@floridarising.org)>; MacKenzie Marcelin <[mackenzie@floridarising.org](mailto:mackenzie@floridarising.org)>; [sebastian@floridarising.org](mailto:sebastian@floridarising.org); Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>; [jjsmith@earthjustice.org](mailto:jjsmith@earthjustice.org)

**Subject:** Urgent Response Needed Re. Fire at EPA-Regulated Incinerator




**Importance:** High

Good Afternoon,

We are writing to bring to your attention a massive fire that broke out yesterday at a municipal waste incinerator in a residential community in Doral, FL: the Miami-Dade County Resources Recovery Facility (address: 6990 NW 97th Avenue, Doral, FL 33178).

EPA maintains oversight of this facility under the Clean Air Act. The fire began around 2 p.m. yesterday, and though it has been contained somewhat, **it is ongoing, and it is expected that it will take days for firefighters to out the fire**. The apparent cause is that waste on a conveyor belt caught on fire.

Here is news coverage of the incident.

- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272447693.html>
- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272457138.html>
- <https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/>
- <https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/>
-  [processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4](#)
-  [processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4](#)
-  [original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4](#)

As you may be aware, Florida Rising has been opposed to this polluting waste incinerator in a residential community, calling for denial of the Title V air permit renewal via written comments and filing a civil rights complaint to EPA's Office of Civil Rights.

Now, community members in this environmental justice community face even more toxic exposure to air pollution from the billowing smoke from this fire, as they are forced to remain indoors and essentially protect themselves from this hazard. As part of its waste burning, this incinerator normally burns plastic and tires, and it is not prohibited from burning medical waste; as a result, the community is naturally fearful of what toxins they are now being exposed to from this fire.

**We are calling on EPA to act under its enforcement authority and its mandate to protect human health from these types of toxic exposures to:**

- 1) **Assist with immediately safeguarding the health of residents near this fire**, including evacuations and the shutting down of schools;
- 2) **Conduct a prompt, full, and independent investigation** into the cause of this fire, making the investigation results available to the public; and

- 3) **Order the facility operator, Covanta Energy, to cease operations at this source** indefinitely, and at least until the conclusion of an independent investigation and the determination by EPA that it is safe to resume operations at this facility.

Waste incinerators emit a host of toxic pollution that is harmful to people's health, and in Doral, in Florida, and in the United States, these facilities are predominantly in Black and brown communities. We are calling on EPA to act now, while also facilitating the shutdown of these harmful facilities in favor of safer, and more sustainable waste management alternatives, such as the ones outlined in your agency's Zero Waste Toolkit.

Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
[www.earthjustice.org](http://www.earthjustice.org)



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Message

---

**From:** Keefer, David [Keefer.David@epa.gov]  
**Sent:** 2/17/2023 9:10:11 PM  
**To:** Jenkins, Brandi [Jenkins.Brandi@epa.gov]; Lamberth, Larry [Lamberth.Larry@epa.gov]  
**CC:** Rubini, Suzanne [Rubini.Suzanne@epa.gov]; Bingham, Kimberly [Bingham.Kimberly@epa.gov]; Webster, James [Webster.James@epa.gov]  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Larry,

There are a number of moving parts to the Miami-Dade Fire response, including significant political interest. Please keep Brandi in-the-loop as the enforcement discussions move forward.

Thanks,

David

---

**From:** Jenkins, Brandi <Jenkins.Brandi@epa.gov>  
**Sent:** Friday, February 17, 2023 3:52 PM  
**To:** Keefer, David <Keefer.David@epa.gov>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Thanks. Can they keep me in the loop?

---

**From:** Keefer, David <Keefer.David@epa.gov>  
**Sent:** Friday, February 17, 2023 3:44 PM  
**To:** Jenkins, Brandi <Jenkins.Brandi@epa.gov>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

FYI, Earthjustice is requesting an enforcement action at Miami-Dade, ECAD is lead for R4 response.

---

**From:** Keefer, David  
**Sent:** Friday, February 17, 2023 3:42 PM  
**To:** Lamberth, Larry <Lamberth.Larry@epa.gov>; Rubini, Suzanne <Rubini.Suzanne@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>  
**Cc:** Hansen, Susan <Hansen.Susan@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Bingham, Kimberly <Bingham.Kimberly@epa.gov>; Chavez, Araceli <Chavez.Araceli@epa.gov>; Russo, Todd <Russo.Todd@epa.gov>; Chaffins, Randall <Chaffins.Randall@epa.gov>; Webster, James <Webster.James@epa.gov>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Everyone:

This is the latest update:

**NRC 1359872, Doral Florida Facility Fire, Doral, Dade County, Florida** - On 02/13, A City-owned, contractor-operated solid waste energy reclamation facility reportedly caught fire at one of the conveyor belt assemblies. The fire spread to three separate metal skinned buildings at the facility. Fire suppression was limited to defensive actions through the night. It is believed that the hazardous materials present at the facility were not involved in the fire at the early stages. An EPA R4 FOSC and Superfund Technical Assessment and Response Team (START) contractors mobilized with air monitoring and air sampling equipment to assist in a determination of what hazardous constituents are in the noxious smoke and may be affecting community health. EPA assets arrived on-site and integrated into Unified Command

on 2/14. The fire still burns and heavy equipment mobilized to assist with suppression operations. Firefighting water is believed to be contained. Miami-Dade County Division of Environmental Resources Management (DERM) conducted runoff water sampling. EPA established air monitoring stations consisting of particulate monitors and toxic chemical monitors (carbon monoxide, hydrogen sulfide, volatile organic compounds (VOC). EPA also established air sampling stations consisting of total VOC, total polycyclic aromatic hydrocarbons (PAHs), asbestos, and Resource Conservation and Recovery Act (RCRA) metals samplers. An additional FOSC mobilized to assist with the operations. An EPA Environmental Justice Standard Report was generated and provided to the FOSC for use by Unified Command as needed. Demolition and fire extinguishment operations continue. Smoke is still impacting the surrounding communities. All EPA generated air monitoring data was provided to Unified Command (UC). UC is working on a communication plan and will issue the data summaries to the public. Air sampling data will be provided to UC once the results are received from the analytical laboratory. One FOSC is demobilizing today. The second FOSC will demobilize once the PRP industrial hygiene contractors are integrated into the air monitoring and air sampling operations.

**Update:** Significant process has been made on building demolition permitting access to the seat of the fire. EPA air monitoring and sampling operations continue. The industrial hygiene firm hired by the PRP arrived on-site early in the morning on 2/17. EPA participated in a press briefing and the City of Doral continued to recommend that residents impacted by the smoke stay indoors with windows closed (shelter-in-place).

Following is a narrative/talking points about the response:

#### **BACKGROUND:**

- On February 13, 2023, a City-owned, solid waste energy reclamation facility, operated by Covanta Holdings Corporation, caught fire at one of the conveyor belt assemblies.
- The fire spread to three separate buildings at the facility.
- Local Emergency Management Officials did not issue any evacuation orders.
- Responding to a request from Miami-Dade County, the U.S. Environmental Protection Agency mobilized an EPA Federal On-Scene Coordinator (FOSC) with contractor support to initiate air monitoring and air sampling operations.
- The EPA established air monitoring stations consisting of particulate monitors and toxic chemical monitors (carbon monoxide, hydrogen sulfide, volatile organic compounds (VOC)). The EPA also established air sampling stations consisting of total VOC, total polycyclic aromatic hydrocarbons (PAHs), and Resource Conservation and Recovery Act (RCRA) metals samplers.
- An additional FOSC mobilized to assist with air monitoring operations on February 14, 2023.
- Demolition and firefighting operations continue as of February 15, 2023; however, smoke continues to emanate from the burning facility.
- EPA continues air sample and air monitoring operations. One round of VOC samples and three rounds of PAH and RCRA metals samples have been collected to date.
- As of 02/15/2023, the fire is currently within a partially collapsed structure. Due to safety concerns no one is able to enter the building where the fire remains. Demolition of the partially collapsed structure has begun. Once demolition completed, final fighting activities can begin.

#### **KEY POINTS:**

- EPA operations at this time consists of air monitoring and sampling operations and provision of technical assistance and coordination with Miami-Dade County.
- There have been PM 2.5 exceedances which fall under the Unhealthy classification based on PM 2.5 Community Action Thresholds. Summary tables have been provided to ATSDR for review and provided to Unified Command. There have been low-level detections of VOCs, CO, and CL but nothing above action levels.
- Air sampling results (lab analysis) are pending.

---

**From:** Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>  
**Sent:** Friday, February 17, 2023 3:02 PM  
**To:** Rubini, Suzanne <[Rubini.Suzanne@epa.gov](mailto:Rubini.Suzanne@epa.gov)>; Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Newman, Keriema <[Newman.Keriema@epa.gov](mailto:Newman.Keriema@epa.gov)>  
**Cc:** Hansen, Susan <[Hansen.Susan@epa.gov](mailto:Hansen.Susan@epa.gov)>; Palmer, Leif <[Palmer.Leif@epa.gov](mailto:Palmer.Leif@epa.gov)>; Keefer, David <[Keefer.David@epa.gov](mailto:Keefer.David@epa.gov)>; Bingham, Kimberly <[Bingham.Kimberly@epa.gov](mailto:Bingham.Kimberly@epa.gov)>; Chavez, Araceli <[Chavez.Araceli@epa.gov](mailto:Chavez.Araceli@epa.gov)>; Russo, Todd <[Russo.Todd@epa.gov](mailto:Russo.Todd@epa.gov)>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Likely. We need to come up to speed quickly, so I am copying our team as well as David.

Larry L. Lamberth  
Deputy Director  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency  
14<sup>th</sup> Floor Sam Nunn Federal Center  
61 Forsyth Street  
Atlanta, Georgia 30303

Telephone: 404-562-8590  
Cell: 404-769-5583  
Fax: 404-562-8566

---

**From:** Rubini, Suzanne <[Rubini.Suzanne@epa.gov](mailto:Rubini.Suzanne@epa.gov)>  
**Sent:** Friday, February 17, 2023 2:57 PM  
**To:** Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>; Newman, Keriema <[Newman.Keriema@epa.gov](mailto:Newman.Keriema@epa.gov)>  
**Cc:** Hansen, Susan <[Hansen.Susan@epa.gov](mailto:Hansen.Susan@epa.gov)>; Palmer, Leif <[Palmer.Leif@epa.gov](mailto:Palmer.Leif@epa.gov)>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

FYI – I think I response would need to come from ECAD.

---

**From:** Dominique Burkhardt <[dburkhardt@earthjustice.org](mailto:dburkhardt@earthjustice.org)>  
**Sent:** Friday, February 17, 2023 2:54 PM  
**To:** Palmer, Leif <[Palmer.Leif@epa.gov](mailto:Palmer.Leif@epa.gov)>; Rubini, Suzanne <[Rubini.Suzanne@epa.gov](mailto:Rubini.Suzanne@epa.gov)>; Hansen, Susan <[Hansen.Susan@epa.gov](mailto:Hansen.Susan@epa.gov)>  
**Cc:** Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Good Afternoon Mr. Palmer, Ms. Rubini, and Ms. Hansen:

I just left a voicemail for Mr. Palmer regarding the waste incinerator that has been on fire in Miami (Doral) since Sunday, in a residential community. Please see below our attempts at having EPA initiate an investigation into the cause of the fire – including any legal or permit violations – as soon as possible.

Thank you for your prompt attention to this matter,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office

4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
[www.earthjustice.org](http://www.earthjustice.org)



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---

**From:** Dominique Burkhardt  
**Sent:** Friday, February 17, 2023 2:40 PM  
**To:** [nowell.valerie@epa.gov](mailto:nowell.valerie@epa.gov)  
**Cc:** [wilson.saundi@epa.gov](mailto:wilson.saundi@epa.gov); Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Good Afternoon Ms. Nowell,

I am writing to bring to your attention a massive fire that broke out at a waste incinerator in Doral, Florida, that has been burning since Sunday. EPA is on site conducting air monitoring, and the readings are showing dangerous spikes in air quality that are harmful to people's health. Five days after the outbreak of this fire, people are still being ordered to remain indoors for their safety.

We are appreciative of EPA's immediate action to monitor the air quality; however, it is just as important that **an independent investigation** be carried out into the cause of this fire, so that any hazards or potential permit or legal violations can immediately be accounted for and addressed – and to prevent this type of hazard from endangering another community.

EPA's Office of Civil Rights had been aware of this incinerator because Earthjustice filed a civil rights complaint last March regarding this and other incinerators in the state. In the email below, ECRCO advised they were looking into the situation. We are writing to ask if an independent investigation can be carried out by R4, either independently or alongside other EPA divisions, such as ECRCO.

Thank you for your attention to this matter,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
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---

**From:** Vong, Suong <Vong.Suong@epa.gov>  
**Sent:** Tuesday, February 14, 2023 2:15 PM  
**To:** Dominique Burkhardt <dburkhardt@earthjustice.org>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

**This message originated outside of Earthjustice. Please use caution before opening attachments or links.**

---

Thank you, Dominique, for bringing this matter to our attention. We are evaluating our options on this issue.

Suong Vong  
Team Lead, Office of External Civil Rights Compliance  
  
Office of Environmental Justice and External Civil Rights  
U.S. Environmental Protection Agency  
Email: [vong.suong@epa.gov](mailto:vong.suong@epa.gov)  
Phone: (202) 564-0392

---

**From:** Dominique Burkhardt <dburkhardt@earthjustice.org>  
**Sent:** Monday, February 13, 2023 12:07 PM  
**To:** Geis, Stacey <Geis.Stacey@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Oquendo, Ana (she/her/hers) <Oquendo.Ana@epa.gov>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Hoang, Anhthu <Hoang.Anhthu@epa.gov>; Vong, Suong <Vong.Suong@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Lassiter, Penny <Lassiter.Penny@epa.gov>  
**Cc:** [gina@floridarising.org](mailto:gina@floridarising.org); Kelli Thomas <[kelli@floridarising.org](mailto:kelli@floridarising.org)>; MacKenzie Marcelin <[mackenzie@floridarising.org](mailto:mackenzie@floridarising.org)>; [sebastian@floridarising.org](mailto:sebastian@floridarising.org); Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>; [jjsmith@earthjustice.org](mailto:jjsmith@earthjustice.org)  
**Subject:** Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High




Good Afternoon,

We are writing to bring to your attention a massive fire that broke out yesterday at a municipal waste incinerator in a residential community in Doral, FL: the Miami-Dade County Resources Recovery Facility (address: 6990 NW 97th Avenue, Doral, FL 33178).

EPA maintains oversight of this facility under the Clean Air Act. The fire began around 2 p.m. yesterday, and though it has been contained somewhat, **it is ongoing, and it is expected that it will take days for firefighters to out the fire.** The apparent cause is that waste on a conveyor belt caught on fire.

Here is news coverage of the incident.

- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272447693.html>
- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272457138.html>
- <https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/>

- <https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/>
-  [processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4](#)
-  [processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4](#)
-  [original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4](#)

As you may be aware, Florida Rising has been opposed to this polluting waste incinerator in a residential community, calling for denial of the Title V air permit renewal via written comments and filing a civil rights complaint to EPA's Office of Civil Rights.

Now, community members in this environmental justice community face even more toxic exposure to air pollution from the billowing smoke from this fire, as they are forced to remain indoors and essentially protect themselves from this hazard. As part of its waste burning, this incinerator normally burns plastic and tires, and it is not prohibited from burning medical waste; as a result, the community is naturally fearful of what toxins they are now being exposed to from this fire.

**We are calling on EPA to act under its enforcement authority and its mandate to protect human health from these types of toxic exposures to:**

- 1) **Assist with immediately safeguarding the health of residents near this fire**, including evacuations and the shutting down of schools;
- 2) **Conduct a prompt, full, and independent investigation** into the cause of this fire, making the investigation results available to the public; and
- 3) **Order the facility operator, Covanta Energy, to cease operations at this source** indefinitely, and at least until the conclusion of an independent investigation and the determination by EPA that it is safe to resume operations at this facility.

Waste incinerators emit a host of toxic pollution that is harmful to people's health, and in Doral, in Florida, and in the United States, these facilities are predominantly in Black and brown communities. We are calling on EPA to act now, while also facilitating the shutdown of these harmful facilities in favor of safer, and more sustainable waste management alternatives, such as the ones outlined in your agency's Zero Waste Toolkit.

Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
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Message

---

**From:** Lamberth, Larry [Lamberth.Larry@epa.gov]  
**Sent:** 2/17/2023 10:41:41 PM  
**To:** Keefer, David [Keefer.David@epa.gov]; Jenkins, Brandi [Jenkins.Brandi@epa.gov]  
**CC:** Rubini, Suzanne [Rubini.Suzanne@epa.gov]; Bingham, Kimberly [Bingham.Kimberly@epa.gov]; Webster, James [Webster.James@epa.gov]  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Thanks David for details. Will do.

Ms. Burkhardt just called me. Brandi I assume you have been in contact with her.

Larry

Larry L. Lamberth  
Deputy Director  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency  
14<sup>th</sup> Floor Sam Nunn Federal Center  
61 Forsyth Street  
Atlanta, Georgia 30303

Telephone: 404-562-8590  
Cell: 404-769-5583  
Fax: 404-562-8566

---

**From:** Keefer, David <Keefer.David@epa.gov>  
**Sent:** Friday, February 17, 2023 4:10 PM  
**To:** Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>  
**Cc:** Rubini, Suzanne <Rubini.Suzanne@epa.gov>; Bingham, Kimberly <Bingham.Kimberly@epa.gov>; Webster, James <Webster.James@epa.gov>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Larry,

There are a number of moving parts to the Miami-Dade Fire response, including significant political interest. Please keep Brandi in-the-loop as the enforcement discussions move forward.

Thanks,

David

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**From:** Jenkins, Brandi <Jenkins.Brandi@epa.gov>  
**Sent:** Friday, February 17, 2023 3:52 PM  
**To:** Keefer, David <Keefer.David@epa.gov>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Thanks. Can they keep me in the loop?

---

**From:** Keefer, David <Keefer.David@epa.gov>  
**Sent:** Friday, February 17, 2023 3:44 PM

**To:** Jenkins, Brandi <Jenkins.Brandi@epa.gov>

**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

FYI, Earthjustice is requesting an enforcement action at Miami-Dade, ECAD is lead for R4 response.

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**From:** Keefer, David

**Sent:** Friday, February 17, 2023 3:42 PM

**To:** Lamberth, Larry <Lamberth.Larry@epa.gov>; Rubini, Suzanne <Rubini.Suzanne@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>

**Cc:** Hansen, Susan <Hansen.Susan@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Bingham, Kimberly <Bingham.Kimberly@epa.gov>; Chavez, Araceli <Chavez.Araceli@epa.gov>; Russo, Todd <Russo.Todd@epa.gov>; Chaffins, Randall <Chaffins.Randall@epa.gov>; Webster, James <Webster.James@epa.gov>

**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Everyone:

This is the latest update:

**NRC 1359872, Doral Florida Facility Fire, Doral, Dade County, Florida** - On 02/13, A City-owned, contractor-operated solid waste energy reclamation facility reportedly caught fire at one of the conveyor belt assemblies. The fire spread to three separate metal skinned buildings at the facility. Fire suppression was limited to defensive actions through the night. It is believed that the hazardous materials present at the facility were not involved in the fire at the early stages. An EPA R4 FOSC and Superfund Technical Assessment and Response Team (START) contractors mobilized with air monitoring and air sampling equipment to assist in a determination of what hazardous constituents are in the noxious smoke and may be affecting community health. EPA assets arrived on-site and integrated into Unified Command on 2/14. The fire still burns and heavy equipment mobilized to assist with suppression operations. Firefighting water is believed to be contained. Miami-Dade County Division of Environmental Resources Management (DERM) conducted runoff water sampling. EPA established air monitoring stations consisting of particulate monitors and toxic chemical monitors (carbon monoxide, hydrogen sulfide, volatile organic compounds (VOC). EPA also established air sampling stations consisting of total VOC, total polycyclic aromatic hydrocarbons (PAHs), asbestos, and Resource Conservation and Recovery Act (RCRA) metals samplers. An additional FOSC mobilized to assist with the operations. An EPA Environmental Justice Standard Report was generated and provided to the FOSC for use by Unified Command as needed. Demolition and fire extinguishment operations continue. Smoke is still impacting the surrounding communities. All EPA generated air monitoring data was provided to Unified Command (UC). UC is working on a communication plan and will issue the data summaries to the public. Air sampling data will be provided to UC once the results are received from the analytical laboratory. One FOSC is demobilizing today. The second FOSC will demobilize once the PRP industrial hygiene contractors are integrated into the air monitoring and air sampling operations.

**Update:** Significant process has been made on building demolition permitting access to the seat of the fire. EPA air monitoring and sampling operations continue. The industrial hygiene firm hired by the PRP arrived on-site early in the morning on 2/17. EPA participated in a press briefing and the City of Doral continued to recommend that residents impacted by the smoke stay indoors with windows closed (shelter-in-place).

Following is a narrative/talking points about the response:

**BACKGROUND:**

- On February 13, 2023, a City-owned, solid waste energy reclamation facility, operated by Covanta Holdings Corporation, caught fire at one of the conveyor belt assemblies.
- The fire spread to three separate buildings at the facility.
- Local Emergency Management Officials did not issue any evacuation orders.
- Responding to a request from Miami-Dade County, the U.S. Environmental Protection Agency mobilized an EPA Federal On-Scene Coordinator (FOSC) with contractor support to initiate air monitoring and air sampling operations.

- The EPA established air monitoring stations consisting of particulate monitors and toxic chemical monitors (carbon monoxide, hydrogen sulfide, volatile organic compounds (VOC)). The EPA also established air sampling stations consisting of total VOC, total polycyclic aromatic hydrocarbons (PAHs), and Resource Conservation and Recovery Act (RCRA) metals samplers.
- An additional FOSC mobilized to assist with air monitoring operations on February 14, 2023.
- Demolition and firefighting operations continue as of February 15, 2023; however, smoke continues to emanate from the burning facility.
- EPA continues air sample and air monitoring operations. One round of VOC samples and three rounds of PAH and RCRA metals samples have been collected to date.
- As of 02/15/2023, the fire is currently within a partially collapsed structure. Due to safety concerns no one is able to enter the building where the fire remains. Demolition of the partially collapsed structure has begun. Once demolition completed, final fighting activities can begin.

#### KEY POINTS:

- EPA operations at this time consists of air monitoring and sampling operations and provision of technical assistance and coordination with Miami-Dade County.
- There have been PM 2.5 exceedances which fall under the Unhealthy classification based on PM 2.5 Community Action Thresholds. Summary tables have been provided to ATSDR for review and provided to Unified Command. There have been low-level detections of VOCs, CO, and CL but nothing above action levels.
- Air sampling results (lab analysis) are pending.

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**From:** Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>

**Sent:** Friday, February 17, 2023 3:02 PM

**To:** Rubini, Suzanne <[Rubini.Suzanne@epa.gov](mailto:Rubini.Suzanne@epa.gov)>; Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Newman, Keriema <[Newman.Keriema@epa.gov](mailto:Newman.Keriema@epa.gov)>

**Cc:** Hansen, Susan <[Hansen.Susan@epa.gov](mailto:Hansen.Susan@epa.gov)>; Palmer, Leif <[Palmer.Leif@epa.gov](mailto:Palmer.Leif@epa.gov)>; Keefer, David <[Keefer.David@epa.gov](mailto:Keefer.David@epa.gov)>; Bingham, Kimberly <[Bingham.Kimberly@epa.gov](mailto:Bingham.Kimberly@epa.gov)>; Chavez, Araceli <[Chavez.Araceli@epa.gov](mailto:Chavez.Araceli@epa.gov)>; Russo, Todd <[Russo.Todd@epa.gov](mailto:Russo.Todd@epa.gov)>

**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Likely. We need to come up to speed quickly, so I am copying our team as well as David.

Larry L. Lamberth  
Deputy Director  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency  
14<sup>th</sup> Floor Sam Nunn Federal Center  
61 Forsyth Street  
Atlanta, Georgia 30303

Telephone: 404-562-8590  
Cell: 404-769-5583  
Fax: 404-562-8566

---

**From:** Rubini, Suzanne <[Rubini.Suzanne@epa.gov](mailto:Rubini.Suzanne@epa.gov)>

**Sent:** Friday, February 17, 2023 2:57 PM

**To:** Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>; Newman, Keriema <[Newman.Keriema@epa.gov](mailto:Newman.Keriema@epa.gov)>

**Cc:** Hansen, Susan <[Hansen.Susan@epa.gov](mailto:Hansen.Susan@epa.gov)>; Palmer, Leif <[Palmer.Leif@epa.gov](mailto:Palmer.Leif@epa.gov)>

**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

FYI – I think I response would need to come from ECAD.

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**From:** Dominique Burkhardt <[dburkhardt@earthjustice.org](mailto:dburkhardt@earthjustice.org)>  
**Sent:** Friday, February 17, 2023 2:54 PM  
**To:** Palmer, Leif <[Palmer.Leif@epa.gov](mailto:Palmer.Leif@epa.gov)>; Rubini, Suzanne <[Rubini.Suzanne@epa.gov](mailto:Rubini.Suzanne@epa.gov)>; Hansen, Susan <[Hansen.Susan@epa.gov](mailto:Hansen.Susan@epa.gov)>  
**Cc:** Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Good Afternoon Mr. Palmer, Ms. Rubini, and Ms. Hansen:

I just left a voicemail for Mr. Palmer regarding the waste incinerator that has been on fire in Miami (Doral) since Sunday, in a residential community. Please see below our attempts at having EPA initiate an investigation into the cause of the fire – including any legal or permit violations – as soon as possible.

Thank you for your prompt attention to this matter,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
[www.earthjustice.org](http://www.earthjustice.org)



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**Sent:** Friday, February 17, 2023 2:40 PM  
**To:** [nowell.valerie@epa.gov](mailto:nowell.valerie@epa.gov)  
**Cc:** [wilson.saundi@epa.gov](mailto:wilson.saundi@epa.gov); Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Good Afternoon Ms. Nowell,

I am writing to bring to your attention a massive fire that broke out at a waste incinerator in Doral, Florida, that has been burning since Sunday. EPA is on site conducting air monitoring, and the readings are showing dangerous spikes in air quality that are harmful to people's health. Five days after the outbreak of this fire, people are still being ordered to remain indoors for their safety.

We are appreciative of EPA's immediate action to monitor the air quality; however, it is just as important that **an independent investigation** be carried out into the cause of this fire, so that any hazards or potential permit or legal violations can immediately be accounted for and addressed – and to prevent this type of hazard from endangering another community.

EPA's Office of Civil Rights had been aware of this incinerator because Earthjustice filed a civil rights complaint last March regarding this and other incinerators in the state. In the email below, ECRCO advised they were looking into the situation. We are writing to ask if an independent investigation can be carried out by R4, either independently or alongside other EPA divisions, such as ECRCO.

Thank you for your attention to this matter,

Dominique Burkhardt  
Senior Attorney  
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**Sent:** Tuesday, February 14, 2023 2:15 PM  
**To:** Dominique Burkhardt <[dburkhardt@earthjustice.org](mailto:dburkhardt@earthjustice.org)>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

**This message originated outside of Earthjustice. Please use caution before opening attachments or links.**

Thank you, Dominique, for bringing this matter to our attention. We are evaluating our options on this issue.

Suong Vong  
Team Lead, Office of External Civil Rights Compliance

Office of Environmental Justice and External Civil Rights  
U.S. Environmental Protection Agency  
Email: [vong.suong@epa.gov](mailto:vong.suong@epa.gov)  
Phone: (202) 564-0392

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**From:** Dominique Burkhardt <[dburkhardt@earthjustice.org](mailto:dburkhardt@earthjustice.org)>  
**Sent:** Monday, February 13, 2023 12:07 PM  
**To:** Geis, Stacey <[Geis.Stacey@epa.gov](mailto:Geis.Stacey@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>; Oquendo, Ana

(she/her/hers) <Oquendo.Ana@epa.gov>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Hoang, Anhtu <Hoang.Anhtu@epa.gov>; Vong, Suong <Vong.Suong@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Lassiter, Penny <Lassiter.Penny@epa.gov>  
Cc: gina@floridarising.org; Kelli Thomas <kelli@floridarising.org>; MacKenzie Marcelin <mackenzie@floridarising.org>; sebastian@floridarising.org; Nestor Perez <nperez@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>; jjsmith@earthjustice.org

**Subject:** Urgent Response Needed Re. Fire at EPA-Regulated Incinerator




**Importance:** High

Good Afternoon,

We are writing to bring to your attention a massive fire that broke out yesterday at a municipal waste incinerator in a residential community in Doral, FL: the Miami-Dade County Resources Recovery Facility (address: 6990 NW 97th Avenue, Doral, FL 33178).

EPA maintains oversight of this facility under the Clean Air Act. The fire began around 2 p.m. yesterday, and though it has been contained somewhat, **it is ongoing, and it is expected that it will take days for firefighters to out the fire**. The apparent cause is that waste on a conveyor belt caught on fire.

Here is news coverage of the incident.

- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272447693.html>
- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272457138.html>
- <https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/>
- <https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/>
-  [processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4](#)
-  [processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4](#)
-  [original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4](#)

As you may be aware, Florida Rising has been opposed to this polluting waste incinerator in a residential community, [calling for denial of the Title V air permit renewal via written comments and filing a civil rights complaint to EPA's Office of Civil Rights](#).

Now, community members in this environmental justice community face even more toxic exposure to air pollution from the billowing smoke from this fire, as they are forced to remain indoors and essentially protect themselves from this hazard. As part of its waste burning, this incinerator normally burns plastic and tires, and it is not prohibited from burning medical waste; as a result, the community is naturally fearful of what toxins they are now being exposed to from this fire.

**We are calling on EPA to act under its enforcement authority and its mandate to protect human health from these types of toxic exposures to:**

- 1) **Assist with immediately safeguarding the health of residents near this fire**, including evacuations and the shutting down of schools;
- 2) **Conduct a prompt, full, and independent investigation** into the cause of this fire, making the investigation results available to the public; and
- 3) **Order the facility operator, Covanta Energy, to cease operations at this source** indefinitely, and at least until the conclusion of an independent investigation and the determination by EPA that it is safe to resume operations at this facility.

Waste incinerators emit a host of toxic pollution that is harmful to people's health, and in Doral, in Florida, and in the United States, these facilities are predominantly in Black and brown communities. We are calling on EPA to act now, while also facilitating the shutdown of these harmful facilities in favor of safer, and more sustainable waste management alternatives, such as the ones outlined in your agency's Zero Waste Toolkit.

Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
[www.earthjustice.org](http://www.earthjustice.org)



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Message

---

**From:** Lamberth, Larry [Lamberth.Larry@epa.gov]  
**Sent:** 2/21/2023 1:44:49 PM  
**To:** Bingham, Kimberly [Bingham.Kimberly@epa.gov]; Russo, Todd [Russo.Todd@epa.gov]  
**CC:** Newman, Keriema [Newman.Keriema@epa.gov]; Jenkins, Brandi [Jenkins.Brandi@epa.gov]  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Morning.

Brandi will be setting up a call either sometime today or early tomorrow. Can you all please be prepared to discuss the regulatory status of the facility (prior to the incident) for this call.

Thanks.

LLL

Larry L. Lamberth  
Deputy Director  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency  
14<sup>th</sup> Floor Sam Nunn Federal Center  
61 Forsyth Street  
Atlanta, Georgia 30303

Telephone: 404-562-8590  
Cell: 404-769-5583  
Fax: 404-562-8566

---

**From:** Lamberth, Larry  
**Sent:** Friday, February 17, 2023 5:42 PM  
**To:** Keefer, David <Keefer.David@epa.gov>; Jenkins, Brandi <Jenkins.Brandi@epa.gov>  
**Cc:** Rubini, Suzanne <Rubini.Suzanne@epa.gov>; Bingham, Kimberly <Bingham.Kimberly@epa.gov>; Webster, James <Webster.James@epa.gov>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Thanks David for details. Will do.

Ms. Burkhardt just called me. Brandi I assume you have been in contact with her.

Larry

Larry L. Lamberth  
Deputy Director  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency  
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**From:** Keefer, David <Keefer.David@epa.gov>  
**Sent:** Friday, February 17, 2023 4:10 PM  
**To:** Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>  
**Cc:** Rubini, Suzanne <Rubini.Suzanne@epa.gov>; Bingham, Kimberly <Bingham.Kimberly@epa.gov>; Webster, James <Webster.James@epa.gov>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Larry,

There are a number of moving parts to the Miami-Dade Fire response, including significant political interest. Please keep Brandi in-the-loop as the enforcement discussions move forward.

Thanks,

David

---

**From:** Jenkins, Brandi <Jenkins.Brandi@epa.gov>  
**Sent:** Friday, February 17, 2023 3:52 PM  
**To:** Keefer, David <Keefer.David@epa.gov>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Thanks. Can they keep me in the loop?

---

**From:** Keefer, David <Keefer.David@epa.gov>  
**Sent:** Friday, February 17, 2023 3:44 PM  
**To:** Jenkins, Brandi <Jenkins.Brandi@epa.gov>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

FYI, Earthjustice is requesting an enforcement action at Miami-Dade, ECAD is lead for R4 response.

---

**From:** Keefer, David  
**Sent:** Friday, February 17, 2023 3:42 PM  
**To:** Lamberth, Larry <Lamberth.Larry@epa.gov>; Rubini, Suzanne <Rubini.Suzanne@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>  
**Cc:** Hansen, Susan <Hansen.Susan@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Bingham, Kimberly <Bingham.Kimberly@epa.gov>; Chavez, Araceli <Chavez.Araceli@epa.gov>; Russo, Todd <Russo.Todd@epa.gov>; Chaffins, Randall <Chaffins.Randall@epa.gov>; Webster, James <Webster.James@epa.gov>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Everyone:

This is the latest update:

**NRC 1359872, Doral Florida Facility Fire, Doral, Dade County, Florida** - On 02/13, A City-owned, contractor-operated solid waste energy reclamation facility reportedly caught fire at one of the conveyor belt assemblies. The fire spread to three separate metal skinned buildings at the facility. Fire suppression was limited to defensive actions through the night. It is believed that the hazardous materials present at the facility were not involved in the fire at the early stages. An EPA R4 FOSC and Superfund Technical Assessment and Response Team (START) contractors mobilized with air monitoring and air sampling equipment to assist in a determination of what hazardous constituents are in the noxious smoke and may be affecting community health. EPA assets arrived on-site and integrated into Unified Command

on 2/14. The fire still burns and heavy equipment mobilized to assist with suppression operations. Firefighting water is believed to be contained. Miami-Dade County Division of Environmental Resources Management (DERM) conducted runoff water sampling. EPA established air monitoring stations consisting of particulate monitors and toxic chemical monitors (carbon monoxide, hydrogen sulfide, volatile organic compounds (VOC)). EPA also established air sampling stations consisting of total VOC, total polycyclic aromatic hydrocarbons (PAHs), asbestos, and Resource Conservation and Recovery Act (RCRA) metals samplers. An additional FOSC mobilized to assist with the operations. An EPA Environmental Justice Standard Report was generated and provided to the FOSC for use by Unified Command as needed. Demolition and fire extinguishment operations continue. Smoke is still impacting the surrounding communities. All EPA generated air monitoring data was provided to Unified Command (UC). UC is working on a communication plan and will issue the data summaries to the public. Air sampling data will be provided to UC once the results are received from the analytical laboratory. One FOSC is demobilizing today. The second FOSC will demobilize once the PRP industrial hygiene contractors are integrated into the air monitoring and air sampling operations.

**Update:** Significant process has been made on building demolition permitting access to the seat of the fire. EPA air monitoring and sampling operations continue. The industrial hygiene firm hired by the PRP arrived on-site early in the morning on 2/17. EPA participated in a press briefing and the City of Doral continued to recommend that residents impacted by the smoke stay indoors with windows closed (shelter-in-place).

Following is a narrative/talking points about the response:

#### **BACKGROUND:**

- On February 13, 2023, a City-owned, solid waste energy reclamation facility, operated by Covanta Holdings Corporation, caught fire at one of the conveyor belt assemblies.
- The fire spread to three separate buildings at the facility.
- Local Emergency Management Officials did not issue any evacuation orders.
- Responding to a request from Miami-Dade County, the U.S. Environmental Protection Agency mobilized an EPA Federal On-Scene Coordinator (FOSC) with contractor support to initiate air monitoring and air sampling operations.
- The EPA established air monitoring stations consisting of particulate monitors and toxic chemical monitors (carbon monoxide, hydrogen sulfide, volatile organic compounds (VOC)). The EPA also established air sampling stations consisting of total VOC, total polycyclic aromatic hydrocarbons (PAHs), and Resource Conservation and Recovery Act (RCRA) metals samplers.
- An additional FOSC mobilized to assist with air monitoring operations on February 14, 2023.
- Demolition and firefighting operations continue as of February 15, 2023; however, smoke continues to emanate from the burning facility.
- EPA continues air sample and air monitoring operations. One round of VOC samples and three rounds of PAH and RCRA metals samples have been collected to date.
- As of 02/15/2023, the fire is currently within a partially collapsed structure. Due to safety concerns no one is able to enter the building where the fire remains. Demolition of the partially collapsed structure has begun. Once demolition completed, final fighting activities can begin.

#### **KEY POINTS:**

- EPA operations at this time consists of air monitoring and sampling operations and provision of technical assistance and coordination with Miami-Dade County.
- There have been PM 2.5 exceedances which fall under the Unhealthy classification based on PM 2.5 Community Action Thresholds. Summary tables have been provided to ATSDR for review and provided to Unified Command. There have been low-level detections of VOCs, CO, and CL but nothing above action levels.
- Air sampling results (lab analysis) are pending.

---

**From:** Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>  
**Sent:** Friday, February 17, 2023 3:02 PM  
**To:** Rubini, Suzanne <[Rubini.Suzanne@epa.gov](mailto:Rubini.Suzanne@epa.gov)>; Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Newman, Keriema <[Newman.Keriema@epa.gov](mailto:Newman.Keriema@epa.gov)>  
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**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

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**Cc:** Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Good Afternoon Mr. Palmer, Ms. Rubini, and Ms. Hansen:

I just left a voicemail for Mr. Palmer regarding the waste incinerator that has been on fire in Miami (Doral) since Sunday, in a residential community. Please see below our attempts at having EPA initiate an investigation into the cause of the fire – including any legal or permit violations – as soon as possible.

Thank you for your prompt attention to this matter,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office

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We are appreciative of EPA's immediate action to monitor the air quality; however, it is just as important that **an independent investigation** be carried out into the cause of this fire, so that any hazards or potential permit or legal violations can immediately be accounted for and addressed – and to prevent this type of hazard from endangering another community.

EPA's Office of Civil Rights had been aware of this incinerator because Earthjustice filed a civil rights complaint last March regarding this and other incinerators in the state. In the email below, ECRCO advised they were looking into the situation. We are writing to ask if an independent investigation can be carried out by R4, either independently or alongside other EPA divisions, such as ECRCO.

Thank you for your attention to this matter,

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Senior Attorney  
Florida Regional Office  
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**To:** Dominique Burkhardt <dburkhardt@earthjustice.org>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

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Thank you, Dominique, for bringing this matter to our attention. We are evaluating our options on this issue.

Suong Vong  
Team Lead, Office of External Civil Rights Compliance  
  
Office of Environmental Justice and External Civil Rights  
U.S. Environmental Protection Agency  
Email: [vong.suong@epa.gov](mailto:vong.suong@epa.gov)  
Phone: (202) 564-0392

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**From:** Dominique Burkhardt <dburkhardt@earthjustice.org>  
**Sent:** Monday, February 13, 2023 12:07 PM  
**To:** Geis, Stacey <Geis.Stacey@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Oquendo, Ana (she/her/hers) <Oquendo.Ana@epa.gov>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Hoang, Anhthu <Hoang.Anhthu@epa.gov>; Vong, Suong <Vong.Suong@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Lassiter, Penny <Lassiter.Penny@epa.gov>  
**Cc:** [gina@floridarising.org](mailto:gina@floridarising.org); Kelli Thomas <[kelli@floridarising.org](mailto:kelli@floridarising.org)>; MacKenzie Marcelin <[mackenzie@floridarising.org](mailto:mackenzie@floridarising.org)>; [sebastian@floridarising.org](mailto:sebastian@floridarising.org); Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>; [jjsmith@earthjustice.org](mailto:jjsmith@earthjustice.org)  
**Subject:** Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High




Good Afternoon,

We are writing to bring to your attention a massive fire that broke out yesterday at a municipal waste incinerator in a residential community in Doral, FL: the Miami-Dade County Resources Recovery Facility (address: 6990 NW 97th Avenue, Doral, FL 33178).

EPA maintains oversight of this facility under the Clean Air Act. The fire began around 2 p.m. yesterday, and though it has been contained somewhat, **it is ongoing, and it is expected that it will take days for firefighters to out the fire.** The apparent cause is that waste on a conveyor belt caught on fire.

Here is news coverage of the incident.

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- <https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/>

- <https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/>
-  [processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4](#)
-  [processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4](#)
-  [original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4](#)

As you may be aware, Florida Rising has been opposed to this polluting waste incinerator in a residential community, calling for denial of the Title V air permit renewal via written comments and filing a civil rights complaint to EPA's Office of Civil Rights.

Now, community members in this environmental justice community face even more toxic exposure to air pollution from the billowing smoke from this fire, as they are forced to remain indoors and essentially protect themselves from this hazard. As part of its waste burning, this incinerator normally burns plastic and tires, and it is not prohibited from burning medical waste; as a result, the community is naturally fearful of what toxins they are now being exposed to from this fire.

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- 1) **Assist with immediately safeguarding the health of residents near this fire**, including evacuations and the shutting down of schools;
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Waste incinerators emit a host of toxic pollution that is harmful to people's health, and in Doral, in Florida, and in the United States, these facilities are predominantly in Black and brown communities. We are calling on EPA to act now, while also facilitating the shutdown of these harmful facilities in favor of safer, and more sustainable waste management alternatives, such as the ones outlined in your agency's Zero Waste Toolkit.

Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
[www.earthjustice.org](http://www.earthjustice.org)



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Message

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**From:** Nowell, Valerie [Nowell.Valerie@epa.gov]  
**Sent:** 2/21/2023 4:14:09 PM  
**To:** Jenkins, Brandi [Jenkins.Brandi@epa.gov]; Russo, Todd [Russo.Todd@epa.gov]  
**CC:** Triplett, Eric [Triplett.Eric@epa.gov]; Ghose, Debashis [Ghose.Debashis@epa.gov]  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

**Importance:** High

Hi Brandi and Todd – I wasn't sure who to notify regarding this communication but wanted to make sure you are at least aware it came in. I've included Todd R. because the email requests an independent investigation into the cause of the fire.

Brandi – Will public affairs be responding to this email? Is there anything you need from me? Please just let me know.

Thank you.

Valerie Nowell  
Supervisory Attorney, Air & EPCRA Law Office  
U.S. Environmental Protection Agency, Region 4  
(404) 562-9555

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**From:** Dominique Burkhardt <dburkhardt@earthjustice.org>  
**Sent:** Friday, February 17, 2023 2:40 PM  
**To:** Nowell, Valerie <Nowell.Valerie@epa.gov>  
**Cc:** Wilson, Saundi <Wilson.Saundi@epa.gov>; Nestor Perez <nperez@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
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EPA's Office of Civil Rights had been aware of this incinerator because Earthjustice filed a civil rights complaint last March regarding this and other incinerators in the state. In the email below, ECRCO advised they were looking into the situation. We are writing to ask if an independent investigation can be carried out by R4, either independently or alongside other EPA divisions, such as ECRCO.

Thank you for your attention to this matter,

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**From:** Vong, Suong <[Vong.Suong@epa.gov](mailto:Vong.Suong@epa.gov)>  
**Sent:** Tuesday, February 14, 2023 2:15 PM  
**To:** Dominique Burkhardt <[dburkhardt@earthjustice.org](mailto:dburkhardt@earthjustice.org)>  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

**This message originated outside of Earthjustice. Please use caution before opening attachments or links.**

Thank you, Dominique, for bringing this matter to our attention. We are evaluating our options on this issue.

Suong Vong  
Team Lead, Office of External Civil Rights Compliance  
  
Office of Environmental Justice and External Civil Rights  
U.S. Environmental Protection Agency  
Email: [vong.suong@epa.gov](mailto:vong.suong@epa.gov)  
Phone: (202) 564-0392

---




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**Sent:** Monday, February 13, 2023 12:07 PM  
**To:** Geis, Stacey <[Geis.Stacey@epa.gov](mailto:Geis.Stacey@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>; Oquendo, Ana (she/her/hers) <[Oquendo.Ana@epa.gov](mailto:Oquendo.Ana@epa.gov)>; Freeman, Caroline <[Freeman.Caroline@epa.gov](mailto:Freeman.Caroline@epa.gov)>; Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Hoang, Anhthu <[Hoang.Anhthu@epa.gov](mailto:Hoang.Anhthu@epa.gov)>; Vong, Suong <[Vong.Suong@epa.gov](mailto:Vong.Suong@epa.gov)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Lassiter, Penny <[Lassiter.Penny@epa.gov](mailto:Lassiter.Penny@epa.gov)>  
**Cc:** [gina@floridarising.org](mailto:gina@floridarising.org); Kelli Thomas <[kelli@floridarising.org](mailto:kelli@floridarising.org)>; MacKenzie Marcelin <[mackenzie@floridarising.org](mailto:mackenzie@floridarising.org)>; [sebastian@floridarising.org](mailto:sebastian@floridarising.org); Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>; [jjsmith@earthjustice.org](mailto:jjsmith@earthjustice.org)  
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- <https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/>
- <https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/>
-  [processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4](#)
-  [processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4](#)
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Senior Attorney  
Florida Regional Office

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Message

---

**From:** Russo, Todd [Russo.Todd@epa.gov]  
**Sent:** 2/21/2023 5:10:12 PM  
**To:** Nowell, Valerie [Nowell.Valerie@epa.gov]; Jenkins, Brandi [Jenkins.Brandi@epa.gov]  
**CC:** Triplett, Eric [Triplett.Eric@epa.gov]; Ghose, Debashis [Ghose.Debashis@epa.gov]  
**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Hi Valerie - Thanks for sending. There have been several emails and inquiries about the fire in Florida. We are looking at it.

Todd

Regards,

Todd Russo  
Chief, Air Enforcement Branch  
Enforcement and Compliance Assurance Division  
U.S. EPA Region 4  
Tel: (404) 562-9194

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---

**From:** Nowell, Valerie <Nowell.Valerie@epa.gov>  
**Sent:** Tuesday, February 21, 2023 11:14 AM  
**To:** Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Russo, Todd <Russo.Todd@epa.gov>  
**Cc:** Triplett, Eric <Triplett.Eric@epa.gov>; Ghose, Debashis <Ghose.Debashis@epa.gov>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
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U.S. Environmental Protection Agency, Region 4  
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**From:** Dominique Burkhardt <[dburkhardt@earthjustice.org](mailto:dburkhardt@earthjustice.org)>  
**Sent:** Friday, February 17, 2023 2:40 PM

**To:** Nowell, Valerie <Nowell.Valerie@epa.gov>

**Cc:** Wilson, Saundi <Wilson.Saundi@epa.gov>; Nestor Perez <nperez@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>

**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

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**From:** Vong, Suong <Vong.Suong@epa.gov>

**Sent:** Tuesday, February 14, 2023 2:15 PM

**To:** Dominique Burkhardt <dburkhardt@earthjustice.org>

**Subject:** RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

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Suong Vong  
Team Lead, Office of External Civil Rights Compliance

Office of Environmental Justice and External Civil Rights  
U.S. Environmental Protection Agency  
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**To:** Geis, Stacey <[Geis.Stacey@epa.gov](mailto:Geis.Stacey@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>; Oquendo, Ana (she/her/hers) <[Oquendo.Ana@epa.gov](mailto:Oquendo.Ana@epa.gov)>; Freeman, Caroline <[Freeman.Caroline@epa.gov](mailto:Freeman.Caroline@epa.gov)>; Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Hoang, Anhthu <[Hoang.Anhthu@epa.gov](mailto:Hoang.Anhthu@epa.gov)>; Vong, Suong <[Vong.Suong@epa.gov](mailto:Vong.Suong@epa.gov)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Lassiter, Penny <[Lassiter.Penny@epa.gov](mailto:Lassiter.Penny@epa.gov)>  
**Cc:** gina@floridarising.org; Kelli Thomas <[kelli@floridarising.org](mailto:kelli@floridarising.org)>; MacKenzie Marcelin <[mackenzie@floridarising.org](mailto:mackenzie@floridarising.org)>; sebastian@floridarising.org; Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>; [ijsmith@earthjustice.org](mailto:ijsmith@earthjustice.org)  
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- <https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/>
- <https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/>
-  [processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4](#)
-  [processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4](#)
-  [original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4](#)

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Florida Regional Office  
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Miami, FL 33137  
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Message

---

**From:** Amber Spradley [Amber.Spradley@wlox.com]  
**Sent:** 4/7/2023 12:02:43 PM  
**To:** EPA Press Office [Press@epa.gov]; Jenkins, Brandi [Jenkins.Brandi@epa.gov]; Wise, Allison [Wise.Allison@epa.gov]; Milbourn, Cathy [Milbourn.Cathy@epa.gov]  
**Subject:** WLOX: Media Request

Hello there,

My name is Amber Spradley. I am a reporter with WLOX in South Mississippi.

I am covering a community group in Pascagoula suing EPA for allowing pyrolysis oil at Chevron, the "Cherokee Concerned Citizens".

I am forwarding a press release I received that is embargoed until 11ET/10CT AM.

Is someone from your team available to Zoom with me this morning or provide a statement in response to the filing and your thoughts on the concern over the health hazards involved, if any.

Thanks so much,

Amber Spradley  
228-806-7325

Begin forwarded message:

**From:** Zahra Ahmad <zahmad@earthjustice.org>  
**Date:** April 6, 2023 at 5:07:07 PM CDT  
**To:** Amber Spradley <Amber.Spradley@wlox.com>  
**Subject:** Embargoed until 11 a.m. EST April 7, 2023

**EMBARGOED UNTIL 11 A.M. EST April 7, 2023**

**For Immediate Release** | April 7, 2023  
Contact: Zahra Ahmad, [zahmad@earthjustice.org](mailto:zahmad@earthjustice.org), (517)898-0924

## **Community Sues EPA for Allowing Production of Petrochemical Fuel Despite Extreme Cancer Risk**

*EPA approved Chevron USA's request to make the fuel despite the up to 1 in 4 cancer risk it poses to a fenceline community in Pascagoula, Mississippi*

**Washington, D.C.**— A community group in Pascagoula, Mississippi, today filed a lawsuit against the Environmental Protection Agency for its approval of new chemicals to make fuels despite finding that the resulting air pollution would pose a cancer risk 250,000 times greater than what the agency typically considers unreasonable.

Cherokee Concerned Citizens is challenging EPA's decision to allow the world's largest Chevron refinery—located about a mile away from their neighborhood—to turn plastic waste into fuels. EPA

determined that production of Chevron's new chemicals will pose up to a 1 in 4 cancer risk, meaning 25% of residents living nearby could develop cancer over their lifetime.

Under the Toxic Substances Control Act, EPA can't approve new chemicals with serious health or environmental risks without identifying and implementing ways to minimize the dangers. The agency can also order lab testing that would clarify such risks. EPA did not do either before approving Chevron's request to produce this hazardous fuel.

"EPA's decision to let Chevron poison the community in Pascagoula with chemicals posing astronomical cancer risks makes a mockery of the agency's stated commitments to environmental justice," said Earthjustice attorney Katherine O'Brien. "EPA needs to follow the law and protect people at the fenceline, not greenwash for Chevron by passing off the company's plastic-waste fuel as a solution to the climate crisis."

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Message

---

**From:** Wise, Allison [Wise.Allison@epa.gov]  
**Sent:** 4/7/2023 12:59:51 PM  
**To:** EPA Press Office [Press@epa.gov]; Jenkins, Brandi [Jenkins.Brandi@epa.gov]; Milbourn, Cathy [Milbourn.Cathy@epa.gov]; Pinkney, James [Pinkney.James@epa.gov]  
**Subject:** RE: WLOX: Media Request

Adding James

Allison

---

**From:** Amber Spradley <Amber.Spradley@wlox.com>  
**Sent:** Friday, April 7, 2023 8:03 AM  
**To:** EPA Press Office <Press@epa.gov>; Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>; Milbourn, Cathy <Milbourn.Cathy@epa.gov>  
**Subject:** WLOX: Media Request

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Thanks so much,

Amber Spradley  
228-806-7325

Begin forwarded message:

**From:** Zahra Ahmad <zahmad@earthjustice.org>  
**Date:** April 6, 2023 at 5:07:07 PM CDT  
**To:** Amber Spradley <Amber.Spradley@wlox.com>  
**Subject:** Embargoed until 11 a.m. EST April 7, 2023

**EMBARGOED UNTIL 11 A.M. EST April 7, 2023**

**For Immediate Release** | April 7, 2023  
Contact: Zahra Ahmad, [zahmad@earthjustice.org](mailto:zahmad@earthjustice.org), (517)898-0924

## **Community Sues EPA for Allowing Production of Petrochemical Fuel Despite Extreme Cancer Risk**

*EPA approved Chevron USA's request to make the fuel despite the up to 1 in 4 cancer risk it poses to a fenceline community in Pascagoula, Mississippi*

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Cherokee Concerned Citizens is challenging EPA's decision to allow the world's largest Chevron refinery—located about a mile away from their neighborhood—to turn plastic waste into fuels. EPA determined that production of Chevron's new chemicals will pose up to a 1 in 4 cancer risk, meaning 25% of residents living nearby could develop cancer over their lifetime.

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Message

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**From:** Milbourn, Cathy [Milbourn.Cathy@epa.gov]  
**Sent:** 4/7/2023 5:01:43 PM  
**To:** Wise, Allison [Wise.Allison@epa.gov]; Jenkins, Brandi [Jenkins.Brandi@epa.gov]; Pinkney, James [Pinkney.James@epa.gov]  
**CC:** Grantham, Nancy [Grantham.Nancy@epa.gov]; EPA Press Office [Press@epa.gov]  
**Subject:** WLOX: Media Request

Hi Allison,

We think this is best handled by R4.

Thanks!

Cathy

---

**From:** Wise, Allison <Wise.Allison@epa.gov>  
**Sent:** Friday, April 7, 2023 9:00 AM  
**To:** EPA Press Office <Press@epa.gov>; Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Milbourn, Cathy <Milbourn.Cathy@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>  
**Subject:** RE: WLOX: Media Request

Adding James

Allison

---

**From:** Amber Spradley <Amber.Spradley@wlox.com>  
**Sent:** Friday, April 7, 2023 8:03 AM  
**To:** EPA Press Office <Press@epa.gov>; Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>; Milbourn, Cathy <Milbourn.Cathy@epa.gov>  
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228-806-7325

Begin forwarded message:

**From:** Zahra Ahmad <[zahmad@earthjustice.org](mailto:zahmad@earthjustice.org)>  
**Date:** April 6, 2023 at 5:07:07 PM CDT  
**To:** Amber Spradley <[Amber.Spradley@wlox.com](mailto:Amber.Spradley@wlox.com)>  
**Subject:** Embargoed until 11 a.m. EST April 7, 2023

**EMBARGOED UNTIL 11 A.M. EST April 7, 2023**

**For Immediate Release** | April 7, 2023  
Contact: Zahra Ahmad, [zahmad@earthjustice.org](mailto:zahmad@earthjustice.org), (517)898-0924

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EPA approved Chevron's creation of fuel products from discarded plastics under a [program](#) that it says will help "confront the climate crisis" by promoting the development of new biofuels to replace petroleum-based fuels. But fuel made from plastic waste is not biofuel; it's part of the oil and gas

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Message

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**From:** Pinkney, James [Pinkney.James@epa.gov]  
**Sent:** 4/7/2023 5:04:30 PM  
**To:** Milbourn, Cathy [Milbourn.Cathy@epa.gov]; Wise, Allison [Wise.Allison@epa.gov]; Jenkins, Brandi [Jenkins.Brandi@epa.gov]  
**CC:** Grantham, Nancy [Grantham.Nancy@epa.gov]; EPA Press Office [Press@epa.gov]  
**Subject:** RE: WLOX: Media Request

Hi Cathy,

I've responded to the reporter informing her that we didn't have any comment aside from the issued press release.

James

---

**From:** Milbourn, Cathy <Milbourn.Cathy@epa.gov>  
**Sent:** Friday, April 7, 2023 1:02 PM  
**To:** Wise, Allison <Wise.Allison@epa.gov>; Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>  
**Cc:** Grantham, Nancy <Grantham.Nancy@epa.gov>; EPA Press Office <Press@epa.gov>  
**Subject:** WLOX: Media Request

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**Subject:** RE: WLOX: Media Request

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**Sent:** Friday, April 7, 2023 8:03 AM  
**To:** EPA Press Office <Press@epa.gov>; Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>; Milbourn, Cathy <Milbourn.Cathy@epa.gov>  
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Message

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**From:** Milbourn, Cathy [Milbourn.Cathy@epa.gov]  
**Sent:** 4/7/2023 5:05:03 PM  
**To:** Pinkney, James [Pinkney.James@epa.gov]; Wise, Allison [Wise.Allison@epa.gov]; Jenkins, Brandi [Jenkins.Brandi@epa.gov]  
**CC:** Grantham, Nancy [Grantham.Nancy@epa.gov]; EPA Press Office [Press@epa.gov]  
**Subject:** RE: WLOX: Media Request

Thank you James!

---

**From:** Pinkney, James <Pinkney.James@epa.gov>  
**Sent:** Friday, April 7, 2023 1:05 PM  
**To:** Milbourn, Cathy <Milbourn.Cathy@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>; Jenkins, Brandi <Jenkins.Brandi@epa.gov>  
**Cc:** Grantham, Nancy <Grantham.Nancy@epa.gov>; EPA Press Office <Press@epa.gov>  
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**To:** Wise, Allison <Wise.Allison@epa.gov>; Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>  
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**Subject:** RE: WLOX: Media Request

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**To:** EPA Press Office <Press@epa.gov>; Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Wise, Allison

<Wise.Allison@epa.gov>; Milbourn, Cathy <Milbourn.Cathy@epa.gov>

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Message

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**From:** Pinkney, James [Pinkney.James@epa.gov]  
**Sent:** 4/7/2023 5:18:54 PM  
**To:** Hansen, Susan [Hansen.Susan@epa.gov]; Kemker, Carol [Kemker.Carol@epa.gov]; Zapata, Cesar [Zapata.Cesar@epa.gov]; Ward, Nacosta [Ward.Nacosta@epa.gov]; Lamberth, Larry [Lamberth.Larry@epa.gov]; Newman, Keriema [Newman.Keriema@epa.gov]; Freeman, Caroline [Freeman.Caroline@epa.gov]; Toney, Anthony [Toney.Anthony@epa.gov]  
**CC:** Wise, Allison [Wise.Allison@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Rubini, Suzanne [Rubini.Suzanne@epa.gov]; Jenkins, Brandi [Jenkins.Brandi@epa.gov]  
**Subject:** RE: WLOX: Media Request

Will do.

James

---

**From:** Hansen, Susan <Hansen.Susan@epa.gov>  
**Sent:** Friday, April 7, 2023 1:17 PM  
**To:** Kemker, Carol <Kemker.Carol@epa.gov>; Zapata, Cesar <Zapata.Cesar@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>; Ward, Nacosta <Ward.Nacosta@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Toney, Anthony <Toney.Anthony@epa.gov>  
**Cc:** Wise, Allison <Wise.Allison@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Rubini, Suzanne <Rubini.Suzanne@epa.gov>  
**Subject:** RE: WLOX: Media Request

We were able to find the complaint - - it was filed in the DC Circuit and is a challenge against a TSCA 5(e) Order that was issued by Headquarters.

[https://www.documentcloud.org/documents/23607053-sl-sanitized\\_consent\\_order\\_p\\_21\\_0144c](https://www.documentcloud.org/documents/23607053-sl-sanitized_consent_order_p_21_0144c)

James - - we should refer any inquiries up to HQ external affairs office for response.

---

**From:** Kemker, Carol <Kemker.Carol@epa.gov>  
**Sent:** Friday, April 7, 2023 10:29 AM  
**To:** Zapata, Cesar <Zapata.Cesar@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>; Ward, Nacosta <Ward.Nacosta@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Toney, Anthony <Toney.Anthony@epa.gov>; Hansen, Susan <Hansen.Susan@epa.gov>  
**Cc:** Wise, Allison <Wise.Allison@epa.gov>  
**Subject:** RE: WLOX: Media Request

Adding Susan Hansen since this sounds like EPA has been sued.

---

**From:** Zapata, Cesar <Zapata.Cesar@epa.gov>  
**Sent:** Friday, April 7, 2023 10:28 AM  
**To:** Kemker, Carol <Kemker.Carol@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>; Ward, Nacosta <Ward.Nacosta@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Toney, Anthony <Toney.Anthony@epa.gov>  
**Cc:** Wise, Allison <Wise.Allison@epa.gov>  
**Subject:** RE: WLOX: Media Request

Including ARD as this is related to the pyrolysis process.

**César A. Zapata**, Director  
Land, Chemicals and Redevelopment Division  
United States Environmental Protection Agency, Region 4

***Our Vision:** Protecting human health and the environment through responsible waste management, effective chemical safety, and collaborative redevelopment of contaminated land.*

***Our Guiding Values:** Customer Service, Innovation, Integrity, National Leadership, Ownership, and Partnerships.*

---

**From:** Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>  
**Sent:** Friday, April 7, 2023 10:23 AM  
**To:** Pinkney, James <[Pinkney.James@epa.gov](mailto:Pinkney.James@epa.gov)>; Ward, Nacosta <[Ward.Nacosta@epa.gov](mailto:Ward.Nacosta@epa.gov)>; Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>; Newman, Keriema <[Newman.Keriema@epa.gov](mailto:Newman.Keriema@epa.gov)>  
**Cc:** Wise, Allison <[Wise.Allison@epa.gov](mailto:Wise.Allison@epa.gov)>; Zapata, Cesar <[Zapata.Cesar@epa.gov](mailto:Zapata.Cesar@epa.gov)>  
**Subject:** RE: WLOX: Media Request

I am looking into this and will get back to you. It sounds like it could be a permitting issue. Give me a bit to figure it out. I'm copying Cesar to see if he knows.

---

**From:** Pinkney, James <[Pinkney.James@epa.gov](mailto:Pinkney.James@epa.gov)>  
**Sent:** Friday, April 7, 2023 10:11 AM  
**To:** Ward, Nacosta <[Ward.Nacosta@epa.gov](mailto:Ward.Nacosta@epa.gov)>; Lamberth, Larry <[Lamberth.Larry@epa.gov](mailto:Lamberth.Larry@epa.gov)>; Newman, Keriema <[Newman.Keriema@epa.gov](mailto:Newman.Keriema@epa.gov)>  
**Cc:** Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Wise, Allison <[Wise.Allison@epa.gov](mailto:Wise.Allison@epa.gov)>  
**Subject:** FW: WLOX: Media Request

Nacosta,

We received the following request for an interview this morning. Who should I work with in ECAD?

James

---

**From:** Wise, Allison <[Wise.Allison@epa.gov](mailto:Wise.Allison@epa.gov)>  
**Sent:** Friday, April 7, 2023 9:00 AM  
**To:** EPA Press Office <[Press@epa.gov](mailto:Press@epa.gov)>; Jenkins, Brandi <[Jenkins.Brandi@epa.gov](mailto:Jenkins.Brandi@epa.gov)>; Milbourn, Cathy <[Milbourn.Cathy@epa.gov](mailto:Milbourn.Cathy@epa.gov)>; Pinkney, James <[Pinkney.James@epa.gov](mailto:Pinkney.James@epa.gov)>  
**Subject:** RE: WLOX: Media Request

Adding James

Allison

---

**From:** Amber Spradley <[Amber.Spradley@wlox.com](mailto:Amber.Spradley@wlox.com)>  
**Sent:** Friday, April 7, 2023 8:03 AM  
**To:** EPA Press Office <[Press@epa.gov](mailto:Press@epa.gov)>; Jenkins, Brandi <[Jenkins.Brandi@epa.gov](mailto:Jenkins.Brandi@epa.gov)>; Wise, Allison <[Wise.Allison@epa.gov](mailto:Wise.Allison@epa.gov)>; Milbourn, Cathy <[Milbourn.Cathy@epa.gov](mailto:Milbourn.Cathy@epa.gov)>  
**Subject:** WLOX: Media Request

Hello there,

My name is Amber Spradley. I am a reporter with WLOX in South Mississippi.

I am covering a community group in Pascagoula suing EPA for allowing pyrolysis oil at Chevron, the “Cherokee Concerned Citizens”.

I am forwarding a press release I received that is embargoed until 11ET/10CT AM.

Is someone from your team available to Zoom with me this morning or provide a statement in response to the filing and your thoughts on the concern over the health hazards involved, if any.

Thanks so much,

Amber Spradley  
228-806-7325

Begin forwarded message:

**From:** Zahra Ahmad <[zahmad@earthjustice.org](mailto:zahmad@earthjustice.org)>  
**Date:** April 6, 2023 at 5:07:07 PM CDT  
**To:** Amber Spradley <[Amber.Spradley@wlox.com](mailto:Amber.Spradley@wlox.com)>  
**Subject:** Embargoed until 11 a.m. EST April 7, 2023

**EMBARGOED UNTIL 11 A.M. EST April 7, 2023**

**For Immediate Release** | April 7, 2023  
Contact: Zahra Ahmad, [zahmad@earthjustice.org](mailto:zahmad@earthjustice.org), (517)898-0924

## **Community Sues EPA for Allowing Production of Petrochemical Fuel Despite Extreme Cancer Risk**

*EPA approved Chevron USA’s request to make the fuel despite the up to 1 in 4 cancer risk it poses to a fenceline community in Pascagoula, Mississippi*

**Washington, D.C.**— A community group in Pascagoula, Mississippi, today filed a lawsuit against the Environmental Protection Agency for its approval of new chemicals to make fuels despite finding that the resulting air pollution would pose a cancer risk 250,000 times greater than what the agency typically considers unreasonable.

Cherokee Concerned Citizens is challenging EPA’s decision to allow the world’s largest Chevron refinery—located about a mile away from their neighborhood—to turn plastic waste into fuels. EPA determined that production of Chevron’s new chemicals will pose up to a 1 in 4 cancer risk, meaning 25% of residents living nearby could develop cancer over their lifetime.

Under the Toxic Substances Control Act, EPA can’t approve new chemicals with serious health or environmental risks without identifying and implementing ways to minimize the dangers. The agency can also order lab testing that would clarify such risks. EPA did not do either before approving Chevron’s request to produce this hazardous fuel.

“EPA’s decision to let Chevron poison the community in Pascagoula with chemicals posing astronomical cancer risks makes a mockery of the agency’s stated commitments to environmental justice,” said Earthjustice attorney Katherine O’Brien. “EPA needs to follow the law and protect people at the

fenceline, not greenwash for Chevron by passing off the company's plastic-waste fuel as a solution to the climate crisis."

The Cherokee Concerned Citizens represent a fenceline community overburdened by pollution from several facilities including the Chevron refinery, which is visible from their neighborhood, a BP gas processing plant, the Mississippi Phosphates superfund site, and more. A total of 70 toxic chemical releases, from benzene to formaldehyde, have been reported to regulatory agencies by the facilities in Pascagoula.

"We can't tolerate it anymore," said **Barbara Weckesser, co-founder of Cherokee Concerned Citizens**. "It's always been profit over the people, but it must end now. The residents in our community are already at a higher risk of developing health problems because of all the industry polluting our neighborhood. The EPA's approval of Chevron's ask is forcing us to fight, leave, or stay here and die."

EPA approved Chevron's creation of fuel products from discarded plastics under a program that it says will help "confront the climate crisis" by promoting the development of new biofuels to replace petroleum-based fuels. But fuel made from plastic waste is not biofuel; it's part of the oil and gas industry's last-ditch effort to protect their profits by betting big on petrochemicals, which are converted components of oil and gas used to make plastic building blocks.

In the U.S., the industry is planning a massive build-out of petrochemical plants. Many of these facilities are planned in low-income communities and communities of color already overburdened by pollution and a long history of environmental racism. If the build-out goes forward, it will lock in more climate pollution, plastic waste, and toxic chemicals that poison communities.

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Mon Feb 07 15:02:41 EST 2022  
EPAExecSec <EPAExecSec@epa.gov>  
FW: Supplement to Sixty-Day Notice of Violations of the ESA for Failing to Reinitiate Consultation Concerning the Unusual Mortality Event for Manatees in the IRL  
To: "CMS.OEX" <cms.oex@epa.gov>

---

**From:** Jessica Hann <jhann@earthjustice.org>  
**Sent:** Monday, February 7, 2022 2:53 PM  
**To:** Able, Tony <Able.Tony@epa.gov>; Gettle, Jeanneanne <Gettle.Jeanneanne@epa.gov>; Regan, Michael <Regan.Michael@epa.gov>  
**Cc:** larry\_williams@fws.gov; martha\_williams@fws.gov; exsec@ios.doi.gov; kimberly.damon-randall@noaa.gov; david.bernhart@noaa.gov; janet.coit@noaa.gov; rick.spinrad@noaa.gov  
**Subject:** Supplement to Sixty-Day Notice of Violations of the ESA for Failing to Reinitiate Consultation Concerning the Unusual Mortality Event for Manatees in the IRL  
**Importance:** High

Dear Officials at the U.S. Environmental Protection Agency,

Please find attached the following documents:

- Supplement to Sixty-Day Notice of Violations of the Endangered Species Act for Failing to Reinitiate Consultation Concerning the Unusual Mortality Event for Manatees in the Indian River Lagoon,
- Report on recent scientific evidence (post-2013) to compel the USEPA and FDEP to reassess Indian River Lagoon, FL Numerical Nutrient Criteria by Peter Barile, Ph.D., and
- Curriculum Vitae for Peter Barile, Ph.D.

These documents are provided on behalf of Center for Biological Diversity, Defenders of Wildlife, and Save the Manatee Club.

A hardcopy of the attached documents along with a USB drive containing all exhibits will follow via certified mail.

Please let me know if you have any questions or concerns.

Thank you,  
  
Jessica

Jessica Hann  
  
*She/Her/Hers*  
  
Senior Litigation Assistant  
  
Biodiversity Defense  
  
P.O. Box 4743  
  
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T: 406.586.9699  
  
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February 7, 2022

Tony Able  
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Jeaneanne Gettle  
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***VIA ELECTRONIC AND CERTIFIED MAIL***

**Re: Supplement to Sixty-Day Notice of Violations of the Endangered Species Act  
for Failing to Reinitiate Consultation Concerning the Unusual Mortality  
Event for Manatees in the Indian River Lagoon**

Dear Officials of the U.S. Environmental Protection Agency:

On behalf of Center for Biological Diversity, Defenders of Wildlife, and Save the Manatee Club, we hereby provide a supplement to our December 20, 2021 notice that the U.S. Environmental Protection Agency is in violation of the Endangered Species Act (“ESA”) for failing to reinitiate consultation with the U.S. Fish and Wildlife Service under ESA section 7, *id.* § 1536, concerning water quality and the unprecedented mortality event for Atlantic Florida manatees (*Trichechus manatus latirostris*) (“manatees”) in the Indian River Lagoon. This supplement includes an expert report by Dr. Peter Barile detailing additional ways the current EPA-approved estuary-specific numeric nutrient criteria are inadequate to prevent seagrass die-off, harmful algal outbreaks, and further manatee mortality events in the Indian River Lagoon. Specifically, Dr. Barile’s report explains that new information demonstrates that nutrient loads from septic tanks were underestimated in the approved numeric nutrient criteria and that the criteria do not account for the confounding role of climate change in driving nutrient loading.

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ED\_014341\_00000225-00003

The report concludes that based on this new information, the current estuary-specific numeric nutrient criteria are currently “an order of magnitude” above maximum concentrations that would support seagrass and should be revised accordingly to prevent eutrophication, loss of seagrass, and harm to the manatee.

Sincerely,

Elizabeth Forsyth  
Earthjustice Biodiversity Defense Program  
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eforsyth@earthjustice.org

*Counsel for Center for Biological Diversity, Defenders of Wildlife, and Save the Manatee Club*

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U.S. Fish and Wildlife Service  
Florida Ecological Services  
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# **Report on recent scientific evidence (post-2013) to compel the USEPA and FDEP to reassess Indian River Lagoon, FL Numerical Nutrient Criteria**

Peter Barile, Ph.D. Senior Scientist  
Marine Research & Consulting, Inc., Melbourne FL

This is an expert report by Peter Barile, Ph.D., Senior Scientist, Marine Research & Consulting, Inc. Melbourne, Florida, on the scientific description of the health of the Indian River Lagoon as it relates to the 2013 EPA-approved Numerical Nutrient Criteria for the Indian River Lagoon system, excess nutrient loading and concentrations, harmful algal blooms and subsequently to seagrasses die-off and loss of over 400 manatees in Brevard County in 2021.

Dr. Barile has a Ph.D. in Environmental Sciences, a Master of Science degree in Marine Biology and a Bachelor's degree in Biological Sciences, all from Florida Tech in Melbourne, FL. Dr. Barile is a former Link Foundation Post Doctoral Fellow in the Division of Marine Science at Harbor Branch Oceanographic Institution in Ft. Pierce, FL. and a former NOAA Sea Grant- Knauss Marine Policy Fellow with residence in the US federal government's executive branch on ocean policy development at the National Science Foundation in Washington, D.C. Dr. Barile has 30 years of experience as a scientist and has authored over 20 peer-reviewed scientific articles, book chapters and public policy documents largely on Florida aquatic ecosystems, including the Indian River Lagoon. He has been relied upon to give expert consultation and testimony to the Florida legislature on the role of land-based sources of pollution to Florida's aquatic ecosystems and served on the Florida Senate's Consumer Fertilizer Task Force.

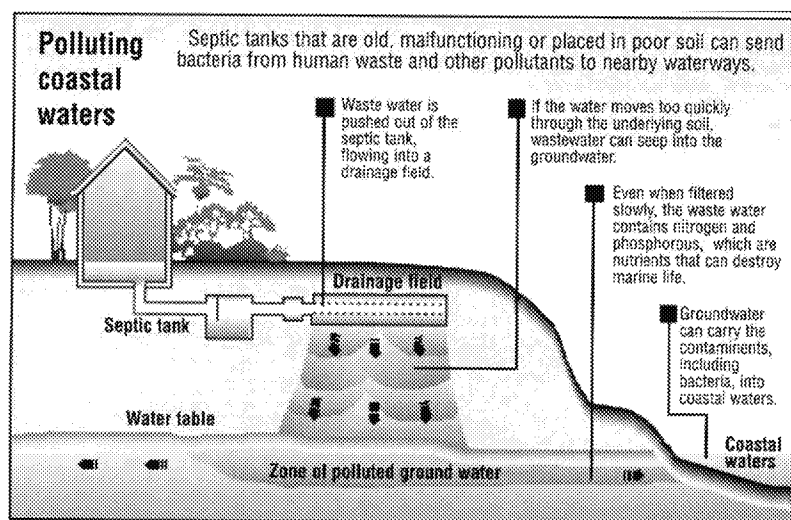
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This report addresses new scientific information that may be used to compel the US Environmental Protection Agency (EPA) under the Clean Water Act to require the Florida Department of Environmental Protection (FDEP) to reassess its Numerical Nutrient Criteria (NNC) for Impaired Waters of the Indian River Lagoon. This analysis includes new scientific evidence, since adoption of the 2013 EPA-approved NNC, revising the understanding of nutrient loading sources to the IRL system and processes that now confound the models used to create the IRL NNC. Since the EPA's adoption of the 2013 NNC, the FDEP's TMDL nutrient reduction

regulatory program has resulted in 1) annual nutrient load and nutrient concentration exceedances that have resulted in 2) unprecedented high density phytoplankton blooms, 3) a 95% loss of historic seagrass coverage in the northern Indian River Lagoon (NIRL), and 4) subsequent die-off of nearly 400 manatees in the NIRL BMAP/TMDL area during 2021.

### 1) Florida DEP underestimated the contribution of nutrient loads from septic tanks

Recent modeling work in Florida indicates that nutrient loading from septic tanks (OSDS) is the second largest nutrient loading source to Florida's aquatic ecosystems (Badruzzaman et al. 2012). The University of Florida's Institute of Food & Agricultural Sciences estimates that there are 2.6 million septic tanks in the state that discharge nearly 426 million gallons of wastewater per day into Florida's ground and surface waters (UF-IFAS 2022). Nearly 300,000 OSDS are in the counties along the IRL system. The widespread pollution of OSDS effluent into the IRL is supported by the hydrogeological properties of the surficial aquifer along the Lagoon that mobilizes effluent downgradient to the IRL's surface waters.



From: Barile and Lapointe (1999)

The EPA's NNC are based upon a NIRL BMAP nutrient load estimate that there are 16,171 residences within this watershed basin that utilize Onsite Sewage Disposal Systems (OSDS) or septic tanks for human waste water treatment (FDEP 2021).

This value may be an underestimate, as Brevard County alone has nearly 90,000 residences on septic tanks, where the SJRWMD (1993) estimated that nearly 70% may be “problem tanks” where changing environmental conditions may directly mobilize effluent to nearby surface or groundwaters beyond those available in the TMDL estimates for the central (CIRL) and northern (NIRL) Indian River Lagoon BMAP areas.

Barile (2018) estimated that 43% of the residences and a total of 91,630 residences utilize septic tanks for human sewage disposal in Brevard County. With flooding conditions associated with heavy wet weather and tropical storm activity, steady state models of septic tank effluent loading to adjacent surface waters, such as the SWIL model used in the FDEP’s NIRL BMAP nutrient loading estimates, are recognized to be conservative and an underestimate of this significant nutrient loading source.

In fact, a 2016 State of Florida South Florida Water Management District resolution (Resolution of the Governing Board #2016-0712, July 14, 2016) indicated that ***“human wastewater including septic tanks is the major source of excess nitrogen in the Indian River Lagoon and is underestimated in past nutrient loading models.”***

Figure 2 to the right is the 2021 FDEP BMAP of the residential septic systems (OSDS) in the NIRL watershed.

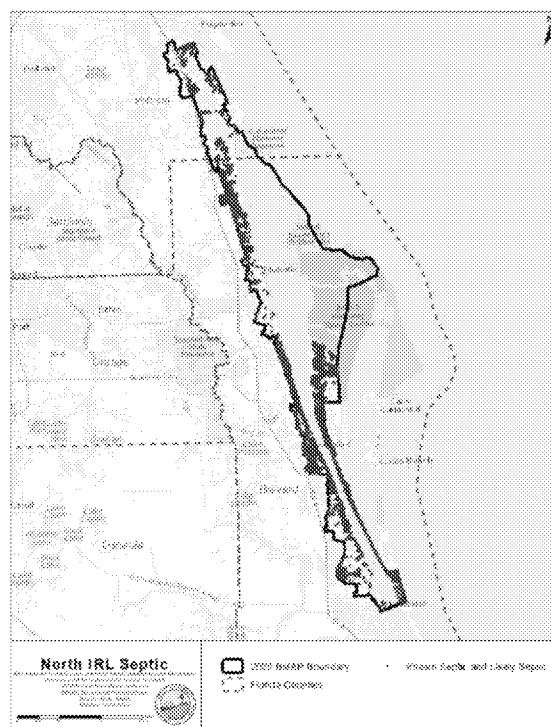


Figure 2. Location of septic systems in the NIRL.

The process of mobilization of septic tank (OSDS) effluent, as a previously underestimated and significant nutrient loading source to the Indian River Lagoon, has been documented recently in several published peer-reviewed academic journal contributions.

In the counties along the ~150 mile long lagoon, nearly 50% of the residences utilize OSDS for wastewater treatment (Barile, 2018), which is significantly higher than the Florida or US national average.

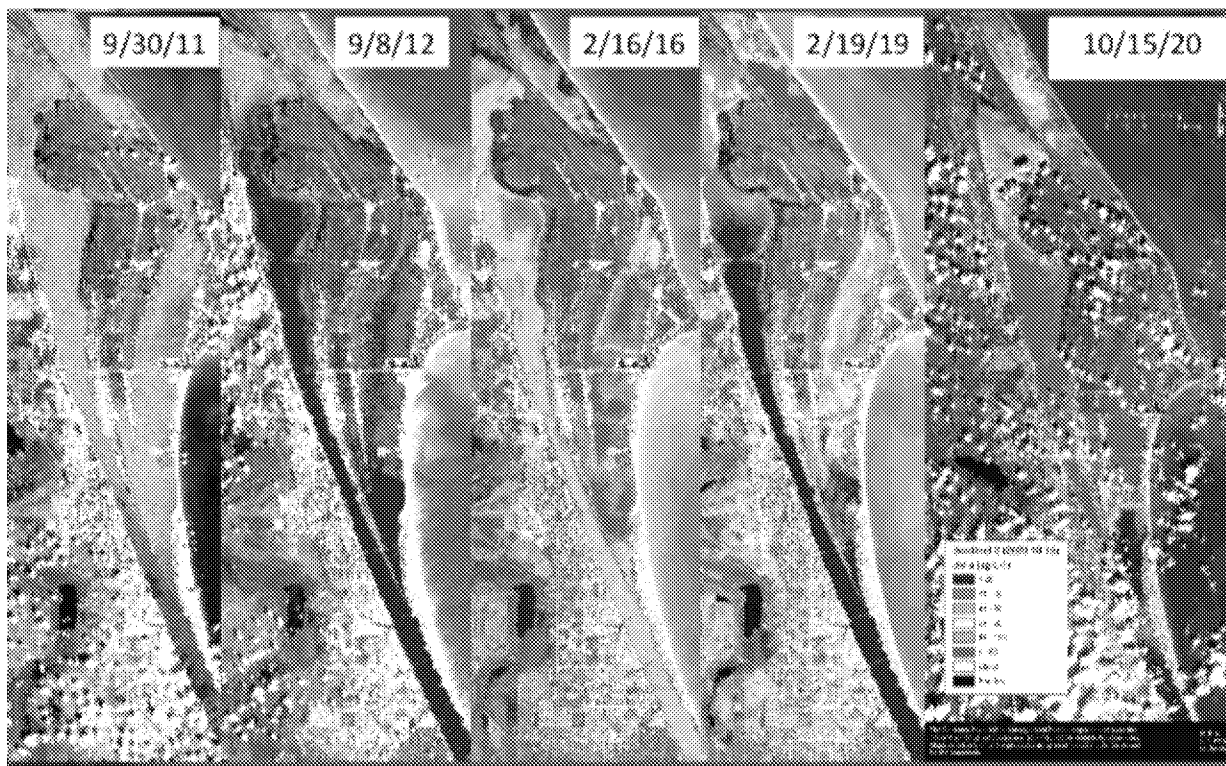
**Lapointe et al. (2017)** reported significantly high concentrations of septic tank (OSDS) inorganic nitrogen and phosphorus in groundwater monitor wells downgradient and adjacent to residential communities utilizing OSDS in the St. Lucie River, FL the primary tributary to the southern IRL. In adjacent surface waters evidence of significantly elevated wastewater nutrients were detected along with the conservative synthetic wastewater tracer, sucralose. Macroalgae and phytoplankton HAB blooms in both the St. Lucie River and southern Indian River Lagoon were enriched with OSDS wastewater nitrogen as a primary source, including the “green guacamole” *Microcystis* blooms that caused a public health crisis and international media attention in the summer of 2016.

**Herren et al. (2021)** reported the movement of septic tank (OSDS) effluent with high concentrations of reactive nitrogen and phosphorus into adjacent groundwaters and then into adjacent surface waters of the Sebastian River and Vero Beach lateral canal tributaries and into the CIRL. They traced OSDS as the dominant nitrogen source into macroalgae HABs in the downstream estuary. The study further used a conservative wastewater tracer, sucralose, as an additional line of evidence to trace OSDS loading from OSDS drainfields into adjacent ground and surface waters. There was significantly higher movement of OSDS nitrogen and phosphorus into adjacent ground and surface waters in the rainy “wet” season compared to the dry season.

**Lapointe et al. (2015)** reported wastewater nitrogen from OSDS as the primary loading source supporting macroalgae HABs at sites along the ~150 mi. IRL system. Sewage nitrogen from OSDS was also reported as a primary source of nitrogen supporting “super bloom” and “brown tide” phytoplankton blooms in the Indian River Lagoon. Total dissolved nitrogen and phosphorus concentrations were also measured above EPA’s NNC nutrient thresholds despite high concentration phytoplankton blooms and macroalgae blooms that should deplete water column nutrient concentrations.

**Kang et al. (2015)** reported for the 2012-2013 “brown tide” *Aureoumbra lagunensis* bloom event in the NIRL and Mosquito Lagoon that this HAB species was supported by a sewage nitrogen source from OSDS in the adjacent watersheds. This brown tide in 2012-2013 was a driver in the loss of ~95% of the seagrasses in the NIRL where the 2021 manatee UME occurred.

**Barile (2018)** documented widespread incorporation of wastewater nitrogen into macroalgal biomass at > 70 sites within tributaries and among the IRL system from Volusia to Palm Beach County. The study indicates that macroalgae HAB species incorporate elevated nitrogen and phosphorus from wastewater into their biomass more significantly during the rainy “wet season” when both elevated mobilization of nearby OSDS effluent sources and where dilapidate wastewater infrastructure either leaks or spills occur. Higher macroalgae tissue nitrogen contents in the rainy season also suggest that nitrogen loads are “externally” derived, and not supplied by “internal” cycling from the sediments or muck deposits.



SJRWMD (2021) Composite image of 2011-2020 HAB chlorophyll levels in the NIRL, all color shades lighter than blue (green, yellow, orange and red) are indicative of excessive HAB chlorophyll levels with higher concentrations from green to red. For reference, any shade darker than “purple” is an NNC exceedance. The HABs in “red” are >20x over the NNC concentration threshold for chlorophyll.

## **2) The 2013 EPA NNC for the IRL may not be adequate to mitigate harmful algal blooms**

The northern and central IRL, Banana River and Mosquito River Lagoons, all “Impaired Waters” portions of the Indian River Lagoon system subject to Clean Water Act and subsequent EPA NNC regulatory action, experienced historically unprecedented and significant “Super blooms” of phytoplankton in 2011-2012 as the FDEP’s NNC & TMDL’s were going through review and adoption by the EPA. Since the adoption of the 2013 EPA-approved NNCs, nearly every rainy season since has caused excessive external nutrient loads (still ~50% above 2021 NIRL BMAP threshold nitrogen and phosphorus loading estimates) that have resulted in unprecedented phytoplankton and macroalgal HABs.

**Whitehouse and Lapointe 2015** reported that widespread macroalgae HABs, *Chaetomorpha* sp. and *Ulva* sp., in the NIRL that overgrow and shade out seagrasses as they have high uptake affinities for low levels of inorganic nitrogen and phosphorus. These macroalgae HAB species, through this physiological ecology study, are demonstrated to reach maximum photosynthetic rates (e.g. *Ulva* sp. doubling biomass every 2 days) at very low level nutrient concentrations, well below the 2013 EPA-approved NNC’s for nitrogen and phosphorus. This peer-reviewed scientific study concludes that the current NNC’s are not sufficient to limit HABs in the northern IRL where >95% seagrass die-off has occurred and >400 manatees died in 2021.

## **3) The 2013 EPA-approved NNC for the IRL may not be adequate to mitigate seagrass die-off**

The process of seagrass loss in estuaries is directly related to water quality declines. Specifically, these processes have been well documented for the northern Indian River Lagoon. Lapointe et al. (2015) reported the relationship between human sewage nitrogen, blooms of phytoplankton and macroalgae cover and their relation to seagrass loss in the NIRL. The 2021 FDEP BMAP TMDL report for the NIRL has acknowledged the relationships between poor water quality and seagrass demise, and that water quality has been “non-compliant” to support seagrass growth since 2007, per the statement below.

***“The mean depth limits of seagrass coverage in the IRL decreased over the years because of changes in water quality resulting from anthropogenic influences. As polluted runoff reaches the Lagoon, it contributes to conditions that prevent the seagrass from growing in deeper water.”***

Since the 2013 BMAP, further evaluations of the seagrass depth limits in the NIRL have been conducted to reassess whether the NIRL project zones have continued to be compliant. **Table 23** and **Table 24** list the results of both steps of these evaluations since 2013, including the number of years that passed Step 2 of the evaluation. In 2020, the evaluation was conducted using the 2013, 2015, 2017, and 2019 seagrass mapping data, which were the latest datasets available at that time. **Figure 15** and **Figure 16** show the results of both steps of the 2020 evaluation for Project Zones A and B, respectively. Neither of the project zones was compliant. As indicated in the 2013 BMAP, DEP assigns detailed allocations in project zones where compliance is not maintained.

**Table 23. Summary of seagrass compliance results, Step 1**

Step 1	North A	North B
2007 – 2013	Fail	Fail
2009 – 2015	Fail	Fail
2011 – 2017	Fail	Fail
2013 – 2019	Fail	Fail

**Table 24. Summary of seagrass compliance results, Step 2**

Note: Parentheses indicate number of years passing of those assessed for the compliance period of record.

Step 2	North A	North B
2007 – 2013	Fail (0 of 4)	Fail (0 of 4)
2009 – 2015	Fail (0 of 4)	Fail (0 of 4)
2011 – 2017	Fail (0 of 4)	Fail (0 of 4)
2013 – 2019	Fail (0 of 4)	Fail (0 of 4)

**Lapointe et al. 2020** reported that excessive nutrient loads during the rainy “wet season,” which coincides with the period of peak seagrass growth, causes phytoplankton HABs that reduced downwelling light levels ( $K_d$ ) below scientifically recognized thresholds known to support seagrass growth or seagrass ecosystem restoration. This study detailed the relationships of excess nitrogen loading from sewage, high water column ammonium concentrations, high levels of downwelling light attenuation ( $K_d$ ) to seagrasses, and biochemical evidence of light limitation to remaining seagrass tissue, indicating stress from low light availability that results in seagrass loss. Carbon isotope analysis, coupled with other

biochemical and environmental data indicate severe light limitation of seagrass growth, even in seagrasses that have survived mortality events during “super bloom” HABs or low dissolved oxygen events resulting from macroalgae and phytoplankton HABs. Furthermore, the current 2013 EPA-approved NNC for nitrogen concentrations found in the NIRL are an order of magnitude above maximum concentrations, reported in Lapointe et al. 2020, for sustaining growth of some seagrass species found in the Indian River Lagoon system. Excess nutrient concentrations reported for the IRL can be directly toxic or indirectly lethal to seagrasses in the IRL system. NNC for the IRL should be revised to address these effects on seagrasses.

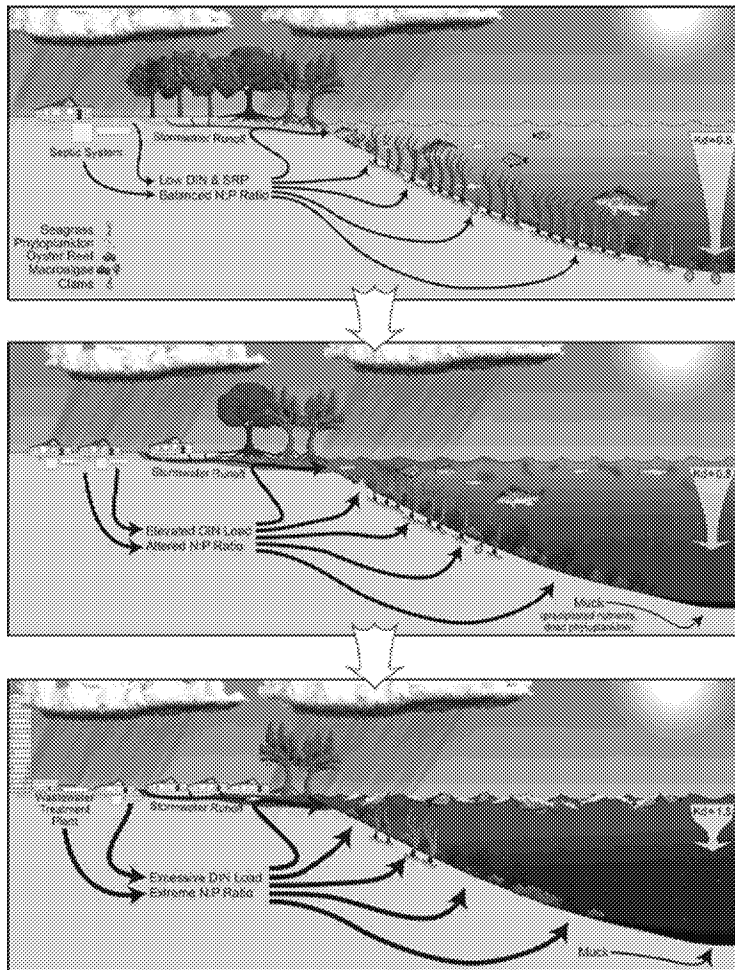


Figure from: Lapointe et al. (2020)

Escalating IRL eutrophication, resulting from low to elevated to excessive nutrient loads and the ecological consequences, including phytoplankton and macroalgae algal blooms, lower downwelling light, seagrass loss, fish kills and muck accumulations. Under elevated nutrient enrichment, the bottom of large portions of the IRL become a “dead zone” devoid of oxygen or light.

**4) The 2013 EPA-approved NNC for the IRL does not account for the confounding role of climate change driven nutrient loading and responses of IRL HABs and seagrass communities.**

In an invited presentation to then Gubernatorial candidate Congressman Ron DeSantis in August 2018, I provided the case study, based upon the peer-reviewed and published Barile (2018) article, on how human-induced climate change significantly increased nutrient loading into the Indian River Lagoon which resulted in a historically significant “brown tide” event in 2017-2018 and continued seagrass loss. Specifically, I described to the soon to be elected Governor how an intense Category 4 hurricane in September 2017 named Irma, strengthened by anthropogenically induced warming of the Caribbean Sea, resulted in storm conditions that caused the dumping of 30 million gallons of untreated sewage into an already beleaguered Indian River Lagoon. The direct nutrient loading from this event resulted in several tons of “new” nitrogen not accounted for in the EPA-NNC of FDEP TMDL.

In fact, climate change impacts are causing serious impacts to the sustainability of coastal estuaries for several reasons. Most directly, increasing human populations in watersheds results in increasing nutrient loading rates to estuaries such as the IRL. The population growth rate in east-central Florida is one of the fastest in the US, conferring necessary re-estimates of non-point source nutrient loading to the IRL. Increased nutrient loading rates should be updated in FDEP TMDL models as increasing human population density occurs in the IRL BMAP watersheds. Other climate change related phenomena in the southeast US, include warming temperatures in aquatic ecosystems, increased precipitation resulting from more intense and frequent tropical storms and hurricanes and El Nino/La Nina cycling, increase in stochastic rainfall events resulting in increased nutrient loading to Florida’s estuaries. Further, warming water temperatures, increased aquatic ecosystem acidification, and consequently, increased dissolved CO<sub>2</sub> in aquatic systems, etc. all confer advantages to HABs and disadvantages to seagrass communities, further confounding the calibration of NNCs/TMDLs. As increased stochastic nutrient loading to the IRL system continues and increasing periodicity and intensity of HABs have occurred since the 2013 EPA NNC approval, the scientific community has taken notice and reported the following.

**Sinha et al. (2017)** reported that climate change induced increases in precipitation in the US will increase nutrient loading to coastal waters in the 21<sup>st</sup> century by 19%. Offsetting this increase will require a 33% reduction in nitrogen loads, presenting a significant management challenge.

**Phlips et al (2020)** reported how increases in intensity and frequency of El Nino events and hurricanes, resulting in increased precipitation and nutrient loads, and have subsequently increased HAB events in the IRL system.

**Phlips et al. (2021)** reported that over the past 23 years of record, an increase in physical factors, such as El Nino cycling and tropical storm events has resulted in increased nutrient concentrations, and an ecological “regime shift” with a dramatic increase in peak biomass of phytoplankton HABs that has coincided with seagrass loss in the Indian River Lagoon system.

**Barile (2018)** reported that recent intense rainfall events have resulted in significant mobilization of human wastewater from OSDS in the IRL BMAP watersheds and from wastewater treatment plant dumping into the IRL, both increasing nutrient loadings and resulting increased incorporation of wastewater nutrients into macroalgal HABs in the IRL system.

### Referenced literature:

Badrazzaman M. et al. 2012. Sources of nutrients impacting surface waters in Florida: a review. *J. Env. Mgmt.* 109: 80-92.

Barile PJ 2018. Widespread sewage pollution of the Indian River Lagoon system, Florida (USA) resolved by spatial analyses of macroalgal biogeochemistry. *Marine Pollution Bulletin* 128, 557-574.

FDEP 2021. BMAP for the Northern Indian River Lagoon.  
[https://publicfiles.dep.state.fl.us/DEAR/BMAP/IndianRiverLagoon/BMAP\\_Documents/2021\\_IRL\\_BMAP\\_Final/NIRL/Final\\_NIRL\\_BMAP20210216.pdf](https://publicfiles.dep.state.fl.us/DEAR/BMAP/IndianRiverLagoon/BMAP_Documents/2021_IRL_BMAP_Final/NIRL/Final_NIRL_BMAP20210216.pdf)

Herren LW et al. 2021. Septic systems drive nutrient enrichment of groundwaters and eutrophication in the urbanized Indian River Lagoon, FL. *Marine Pollution Bulletin* 172: 112928.

Kang Y, Koch, F, Gobler, CJ. 2015. The interactive roles of nutrient loading and zooplankton grazing in facilitating the expansion of harmful algal blooms caused by the pelagophyte *Aureoumbra lagunensis* to the Indian River Lagoon, USA. *Harmful Algae* 49: 162-173.

Lapointe BE, LW Herren, DD Debortoli, MA. Vogel. 2015. Evidence of sewage-driven eutrophication and harmful algal blooms in Florida's Indian River Lagoon. *Harmful Algae* 43: 82-102.

Lapointe BE, Herren LW, Paule AL. 2017. Septic systems contribute to nutrient pollution and harmful algal blooms in the St. Lucie Estuary, SE Florida, USA. *Harmful Algae* 70: 1-22

Lapointe BE, Herren LW, Brewton RA and P Alderman. 2020. Nutrient over-enrichment and light limitation of seagrass communities in the Indian River Lagoon, and urbanized subtropical estuary. *Science Total Environment*. 699: 134068.

Phlips, EJ et al. 2020. Hurricanes, El Nino and harmful algal blooms in two sub-tropical Florida estuaries: direct and indirect impacts. ***Nature Research*** 10: 1910.

Phlips EJ et al. 2021. Cyclical patterns and a regime shift in the character of phytoplankton blooms in a restricted sub-tropical lagoon, Indian River Lagoon, FL, US. ***Front. Mar. Sci.*** 8: 730934.

Sinha E et al. 2017. Eutrophication will increase during the 21<sup>st</sup> century as a result of precipitation changes. ***Science*** 357(6349): 405-408.

SJRWMD 1993. OSDS Problem Area Index for Brevard County. Technical document. July 1993.

University of Florida- Institute of Food and Agricultural Science. 2022.  
<https://water.ifas.ufl.edu/septic-systems/>

Whitehouse L and BE Lapointe. 2015. Comparative ecophysiology of bloom forming macroalgae in the Indian River Lagoon, FL. *Ulva lactuca*, *Hypnea musciformis*, and *Gracilaria tikvahiae*. ***J. Exp. Mar. Biol. Ecol.*** 471: 208-216.

## **Peter J. Barile**

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**Areas of expertise:** aquatic ecology, biogeochemistry, water quality, nutrient pollution in aquatic systems, harmful algae blooms, coastal and estuarine ecology, coral reefs, fisheries, science policy, Everglades and coastal restoration.

### **Education**

#### **Florida Institute of Technology**

Ph.D. - Environmental Sciences 2001

##### Dissertation title:

Local, regional, and global biogeochemical linkages to the physiological ecology of macroalgae on coral reef communities near Green Turtle Cay, Abaco Cays, Bahamas

M.S. - Marine Biology 1993

B.S. - Biological Sciences 1990

### **Professional Experience**

#### **Marine Research & Consulting, Inc.**

Melbourne, FL

Senior Scientist- Science policy and technical assessments of coastal aquatic ecosystem and benthic ecology, fisheries, and anthropogenic pollution loading of southeastern US aquatic ecosystems. 2006 to present

#### **Florida Atlantic University/ HBOI Marine Science Program**

Ft. Pierce, FL

Instructor- Course development and instruction: BSC-6936 (senior/graduate-level) “*Eutrophication in the Marine Environment*,” and guest lecturer “*Natural History of the Indian River Lagoon*” and “*Global Change and the Marine Environment*” 2003-2005

#### **Harbor Branch Oceanographic Institution**

Ft. Pierce, FL

Post Doctoral Research Fellow- Biogeochemistry and chemical ecology of invasive macroalgal blooms from coral reefs of southeast Florida. 2002- 2005  
Research Associate- EPA- ECOHAB study of nitrogen sources to macroalgal bloom formation on coral reefs of southeast Florida. 2001

Graduate Research Assistant- Division of Marine Sciences. Eco-physiology of macroalgae on reefs of south Florida and the Caribbean. Lecturer in Reef Watch program- American Museum of Natural History and NASA. 1998  
Research Assistant- Operation of phytoplankton aquaculture facility for HBOI's aquaculture program. Mass culture of hard clams and oysters. 1991

### **National Science Foundation**

Washington D.C.

John Knauss Marine Science Policy Fellow - Science policy development of interagency initiatives on *marine biodiversity*, *coral reefs*, and *harmful algae blooms* (HABs). Experience in administration of NSF proposal review process. Sponsored by the NOAA, Florida Sea Grant Program. 1994-1995

### **NOAA (National Undersea Res. Prog.)- Caribbean Marine Research Center**

Vero Beach, FL

Biologist- Management of Florida Keys Queen Conch ecology and aquaculture research program, field and lab studies on phytoplankton and shellfish aquaculture and restoration. 1992

### **Florida Department of Natural Resources**

Marathon, FL

Biological Scientist- Research Assistant in the Conch Restoration Program at the Keys Marine Laboratory on Long Key. 1992

### **Specialized Training**

Open Water Scuba Diver- PADI & Nitrox certified, HBOI certified to 130'  
ESRI ArcView® Geographic Information Systems (GIS), AutoCAD®  
Certified small boat operator, CPR/ First-Aid (HBOI)

### **Academic Awards**

**Post Doctoral Research Fellowship**- Div. of Marine Sciences, HBOI – 2002-2005  
**Aylesworth Scholar in Marine Sciences**- FL Sea Grant College 1992, 1999-2000  
**Florida Air & Waste Scholarship Award**- Graduate scholarship 1998  
**John Knauss Marine Policy Fellowship**- National Sea Grant Program- 1994

### **Professional Affiliations**

American Society of Limnology and Oceanography, Estuarine Research Federation  
Florida Academy of Sciences, Gulf & Caribbean Fisheries Institute

## Publications

- Barile, P.J. 2018. Widespread sewage pollution of the Indian River Lagoon system, Florida, (USA) resolved by spatial analyses of macroalgal biogeochemistry. *Marine Pollution Bulletin* 128: 557-574.
- Florida Consumer Fertilizer Task Force. 2008. Final report to the Florida legislature. Florida Conflict Resolution Consortium. Florida State University. 34 p.
- Littler M.M., D.S. Littler, B.E. Lapointe and P.J. Barile. 2006. Toxic cyanobacteria associated with groundwater conduits in the Bahamas. *Coral Reefs* 25(2): 186.
- Barile, P.J. and B.E. Lapointe. 2005. Atmospheric nitrogen deposition from a remote source enriches macroalgae in coral reef ecosystems near Green Turtle Cay, Bahamas. *Marine Pollution Bulletin* 50(11): 1262-1272.
- Bacchus, S.T. and P.J. Barile. 2005. Discriminating sources and flowpaths of anthropogenic nitrogen discharges to Florida's springs, streams and lakes. *Environ. & Engineer. Geosci.* 9(4): 369-391.
- Lapointe, B.E., P.J. Barile, M.M. Littler, D.S. Littler. 2005. Macroalgal harmful algae blooms (HABs) on southeast Florida coral reefs: II. Cross-shelf discrimination of nitrogen sources indicates widespread assimilation of sewage nitrogen. *Harmful Algae* 4(6): 1106-1122.
- Lapointe, B.E., P.J. Barile, M.M. Littler, D.S. Littler, B. Bedford, and C. Gasque. 2005. Macroalgal HABs on southeast Florida coral reefs: I. Nutrient stoichiometry of the invasive green alga *Codium isthmocladum* in the wider Caribbean indicates nutrient enrichment. *Harmful Algae* 4(6): 1092-1105.
- Lapointe, B.E., P.J. Barile, and M.J. Wynne. 2005. Reciprocal *Caulerpa* Invasion: Mediterranean native *Caulerpa ollivieri* in the Bahamas supported by human nitrogen enrichment. *Aquatic Invaders* 16(2): 2-5.
- Barile, P.J. 2004. Evidence for anthropogenic nitrogen enrichment of the littoral waters of East Central Florida. *Journal of Coastal Research* 20(4): 1237-1245.
- Lapointe, B.E., P.J. Barile, C.S. Yentsch. 2004. Physiology and ecology of macroalgal blooms on coral reefs off northern Palm Beach County, Florida. *Harmful Algae* 3: 224-225.
- Barile, P.J. 2004. Comments on: Trophic structure and productivity of a windward coral reef community on Eniwetok Atoll. Special Issue: *Through the Macroscope: the legacy of H.T. Odum*, Brown, M.T. and Hall, C.S. (Eds.) *Ecological Modelling* 178(1): 51-57.
- Lapointe, B.E., P.J. Barile and W.R. Matzie. 2004. Anthropogenic nutrient enrichment of seagrass and coral reef communities in the lower Florida Keys: discrimination of local versus regional nitrogen sources. *Journal of Experimental Marine Biology & Ecology* 308(1): 23-58.
- Barile, P.J., B.E. Lapointe, and T.R. Capo. 2004. Dietary nitrogen availability in macroalgae enhances growth of the sea hare *Aplysia californica*. *Journal of Experimental Marine Biology & Ecology* 303(1): 65-78.
- Lapointe, B.E., P.J. Barile, C.S. Yentsch, M.M. Littler, D.S. Littler, and B. Kakuk. 2004. The relative importance of nutrient enrichment and herbivory on macroalgal communities near Norman's Pond Cay, Exumas Cays, Bahamas: a "natural" experiment. *Journal of Experimental Marine Biology & Ecology*. 298(2): 275-301.

Lapointe, B.E. and P.J. Barile. 2004. Seagrass die-off in Florida Bay: an alternative interpretation. *Estuaries* 27(1): 157-164.

Lapointe, B.E., W.R. Matzie, and P.J. Barile. 2002. Biotic phase-shifts in Florida Bay and bank reef communities of the Florida Keys: linkages with historical freshwater flows and nitrogen loading from Everglades runoff. In: Porter, J.W. and Porter, K.S. (Eds.) *Everglades, Florida Bay and coral reefs of the Florida Keys: an ecosystem sourcebook*, CRC Press Boca Raton, FL. Chapter 23: 629-647.

Lapointe, B.E. and P.J. Barile. 2001. Discrimination of nitrogen sources to harmful macroalgal blooms on coral reefs off southeast Florida. Final Report to the Florida Institute of Oceanography. Sub-agreement #4710173L3A.

Barile, P.J. and B.E. Lapointe. 1999. Estuaries in distress. *Florida Naturalist* 72(2): 26-28

Stoner, A.W., R.A. Glazer, and P.J. Barile. 1996. Larval supply to queen conch nurseries: Relationships with recruitment process and population size in Florida and the Bahamas. *Journal of Shellfish Research* 15(2): 407-420.

Barile, P.J., A.W. Stoner, and C.M. Young. 1994. Phototaxis and vertical migration behavior of the queen conch *Strombus gigas* veliger larvae. *Journal of Experimental Marine Biology & Ecology* 183: 147-162.

Barile, P.J. 1990. Advances in angelwing clam culture: A species with mariculture potential for the southeastern U.S. and Caribbean. *Proceedings from the Gulf & Caribbean Fisheries Institute* 43: 581-585.

Barile, D.D. W.F. Rathjen, P. J. Barile, and J. Steward. 1986. An analysis of a ten-year storm event on and the hard clam *Mercenaria* population in the Indian River Lagoon. *Florida Scientist* 49(1): 9-10.

Mon Dec 20 10:20:37 EST 2021  
EPAExecSec <EPAExecSec@epa.gov>  
FW: Sixty-Day Notice of Violations of the ESA for Failing to Reinitiate Consultation Concerning the Unusual Mortality Event for Manatees  
To: "CMS.OEX" <cms.oex@epa.gov>

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**From:** Jessica Hann <jhann@earthjustice.org>  
**Sent:** Monday, December 20, 2021 10:00 AM  
**To:** Able, Tony <Able.Tony@epa.gov>; Regan, Michael <Regan.Michael@epa.gov>  
**Cc:** larry\_williams@fws.gov; martha\_williams@fws.gov; exsec@ios.doi.gov; kimberly.damon-randall@noaa.gov; david.bernhart@noaa.gov  
**Subject:** Sixty-Day Notice of Violations of the ESA for Failing to Reinitiate Consultation Concerning the Unusual Mortality Event for Manatees

Dear Officials at the U.S. Environmental Protection Agency,

Please find attached the Sixty-Day Notice of Violations of the Endangered Species Act for Failing to Reinitiate Consultation Concerning the Unusual Mortality Event for Manatees in the Indian River Lagoon. The notice is provided on behalf of Center for Biological Diversity, Defenders of Wildlife, and Save the Manatee Club.

A hardcopy of the notice along with a USB drive containing all exhibits will follow via certified mail.

Please let me know if you have any questions or concerns.

Thank you,  
  
Jessica

Jessica Hann  
  
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December 20, 2021

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***VIA ELECTRONIC AND CERTIFIED MAIL***

**Re: Sixty-Day Notice of Violations of the Endangered Species Act for Failing to Reinitiate Consultation Concerning the Unusual Mortality Event for Manatees in the Indian River Lagoon**

Dear Officials of the U.S. Environmental Protection Agency:

On behalf of Center for Biological Diversity, Defenders of Wildlife, and Save the Manatee Club, we hereby provide notice in accordance with the citizen suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), that the U.S. Environmental Protection Agency (“EPA”) is in violation of the ESA for failing to reinitiate consultation under ESA section 7, *id.* § 1536, concerning water quality and the unprecedented mortality event for Atlantic Florida manatees (*Trichechus manatus latirostris*) (“manatees”) in the Indian River Lagoon. Specifically, the EPA has unlawfully failed to reinitiate section 7 consultation with U.S. Fish and Wildlife Service (“FWS”) in light of significant new information undermining EPA and FWS’s conclusions that the Clean Water Act (“CWA”) estuary-specific numeric nutrient criteria are not likely to adversely affect any federally listed species or their critical habitats, including the manatee and its habitat.

More than 1,000 manatees have died so far this year in Florida, as part of a catastrophic “Unusual Mortality Event.” This represents roughly double the average number of deaths in years prior, and it is the most deaths ever recorded in a year. More than half of those deaths occurred in the northern Indian River Lagoon due to starvation and malnutrition caused by seagrass die-offs attributable to nutrient pollution and associated harmful algal outbreaks.

Congress enacted the ESA and CWA to prevent such harms. These statutes require that EPA-approved water quality standards ensure the protection of water quality and threatened species such as the manatee. However, the current estuary-specific numeric nutrient criteria fail to fulfill these mandates. New information shows that the current criteria suffer from lax enforcement, an inappropriately long trajectory to achieve compliance, and a failure to take into account the impact of legacy pollution. As a result, approximately 12% of the estimated Florida manatee population statewide has died, with the Atlantic subpopulation having lost approximately 19% of its population. In short, both the Indian River Lagoon and the manatee are presently in the midst of ecological collapse. Further, it appears likely that the 2021 Unusual Mortality Event will not be a one-time event, but rather portends a grim future of continued manatee deaths unless more effective actions are taken to address the key environmental factor driving them—nutrient pollution of key estuary habitats that is destroying habitat, including food for manatees and many other species. Together, the ESA and the CWA require such actions. This letter provides notice that your agency is violating the law by failing to take them.

## **I. LEGAL BACKGROUND**

### **A. EPA’s Obligations in Approving Water Quality Standards under the Clean Water Act**

The Clean Water Act was enacted almost 50 years ago to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.” Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, codified as amended at 33 U.S.C. §§ 1251–1387 (2013) (the “Clean Water Act”). To achieve this goal, the CWA requires states to set water quality standards protective of public health and the environment, 33 U.S.C. § 1313(c), and to develop pollution budgets known as “total maximum daily loads” (“TMDLs”) for each pollutant impairing a waterbody, *id.* § 1313(d); 40 C.F.R. § 130.2(i). These TMDLs set a numeric target reflecting the maximum amount of the pollutant that a waterbody can contain and still be considered in compliance with water quality standards. 33 U.S.C. § 1313(d).

EPA oversees Florida’s development of water quality standards and TMDLs. *Id.* § 1313(c)(3), (d)(2). Pursuant to guidance implementing EPA’s CWA regulations, EPA is to carefully review the adequacy of TMDLs, including ensuring that the TMDLs have a margin of safety to account for lack of knowledge concerning the relationship between load and wasteload allocations and water quality and that the TMDLs provide “reasonable assurances” that point and nonpoint source control measures will achieve the expected load reductions.<sup>1</sup>

### **B. EPA’s Consultation Obligations under the ESA**

Congress enacted the Endangered Species Act in 1973 to provide “a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “a program for the conservation of such endangered species and threatened species.” 16

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<sup>1</sup> See EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 (May 20, 2002), *available at* [https://www.epa.gov/sites/default/files/2015-10/documents/2002\\_06\\_04\\_tmdl\\_guidance\\_final52002.pdf](https://www.epa.gov/sites/default/files/2015-10/documents/2002_06_04_tmdl_guidance_final52002.pdf) (last visited Nov. 30, 2021).

U.S.C. § 1531(b). The statute contains an array of provisions designed to afford imperiled species “the highest of priorities,” so that they can recover to the point where federal protection is no longer needed. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

Section 7(a)(2) of the ESA imposes on federal agencies such as EPA a substantive duty to ensure that actions they authorize or carry out—including approval of a state’s water quality standards—are not likely to jeopardize listed species or destroy or adversely modify critical habitat designated for such species. 16 U.S.C. § 1536(a)(2); *see also* Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act, 66 Fed. Reg. 11202 (Feb. 22, 2001) (“EPA & FWS MOU”). Such “action agencies” must discharge this obligation in consultation with the appropriate expert fish and wildlife agency—FWS in the case of the manatee. *See id.*; 50 C.F.R. § 402.01(b). If the action agency determines its action may adversely affect listed species or critical habitat, it must initiate formal consultation with FWS. 50 C.F.R. § 402.14(a). If the action agency determines, with written concurrence of FWS, that the proposed action is not likely to adversely affect any listed species or critical habitat, the action agency need not initiate formal consultation. *Id.* § 402.13(c).

The ESA also requires that consultation be reinitiated in certain circumstances where “discretionary Federal involvement or control over the action has been retained or is authorized by law.” 50 C.F.R. § 402.16. With regards to state water quality standards, EPA has continuing discretionary involvement and control under 33 U.S.C. § 1313(c)(4)(B), which allows it to revise water quality standards “in any case where the [EPA] Administrator determines that a revised or new standard is necessary to meet the requirements of [the Clean Water Act].” *See also* EPA & FWS MOU at 11206 (“EPA and the Services have agreed that where information indicates an existing standard is not adequate to avoid jeopardizing listed species, or destroying or adversely modifying designated critical habitat, EPA will work with the State/Tribe to obtain revisions in the standard or, if necessary, revise the standards through the promulgation of federal water quality standards under section 303(c)(4)(B) of the CWA.”); *Wild Fish Conservancy v. United States Env’t Prot. Agency*, 331 F. Supp. 3d 1210, 1222–26 (W.D. Wash. 2018) (finding that EPA retains discretionary involvement and control over approved water quality standards for the purposes of reinitiating consultation). Reinitiation of consultation is required:

- (1) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or
- (4) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16(a).

## II. HISTORY OF INDIAN RIVER LAGOON WATER QUALITY STANDARDS AND ESA CONSULTATION

On June 13, 2012, Florida submitted revised water quality standards for EPA’s approval under 33 U.S.C. § 1313(c). *See* Decision Document of United States Environmental Protection Agency Determination Under § 303(c) of the Clean Water Act, Review of Amendments to Florida’s Rule 62-302 and 62-303 (Nov. 30, 2012) (approving Fla. Admin. Code Ann. r. 62-302.531). EPA approved the revisions on November 30, 2012. *Id.* The revisions included a rule adopting a framework for developing criteria to numerically interpret the existing statewide narrative nutrient criterion that “in no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna.” *Id.* at 18. The framework explains that where a site-specific nutrient analysis has been performed for a particular waterbody—including through development of a total maximum daily load—this site-specific analysis will be considered the applicable numeric interpretation of the narrative criterion for a particular waterbody. *Id.*; Fla. Admin. Code Ann. r. 62-302.531. For the Indian River Lagoon and its constituent Banana River Lagoon, Florida’s Department of Environmental Protection (“FDEP”) set TMDLs for nitrogen, phosphorus, and dissolved oxygen in 2009. *See* FDEP, TMDL Report, Nutrient and Dissolved Oxygen TMDLs for the Indian River and Banana River Lagoon (Mar. 2009). EPA approved these TMDLs as nutrient criteria on July 29, 2013, and they are codified as the “Estuary-Specific Numeric Interpretations of the Narrative Nutrient Criterion” under Fla Admin. Code r. 62-302.532(aa) (referencing Fla Admin. Code r. 62-304.520 (Indian River Lagoon TMDLs)).

Pursuant to section 7 of the ESA, EPA consulted with FWS—as well as with the National Marine Fisheries Service (“NMFS”)<sup>2</sup>—multiple times under 50 C.F.R. § 402.13 on its approval of Florida’s water quality standards. This included (1) consulting with FWS on EPA’s approval of Florida’s revisions in 2012;<sup>3</sup> (2) consulting with FWS on EPA’s approval of amendments to these revisions in 2013—which among other things, approved the specific TMDLs for the Indian River Lagoon;<sup>4</sup> and (3) consulting with FWS on EPA’s approval to changes made to Florida’s statewide estuary-specific numeric nutrient criteria in 2017 (which did not alter the previously approved TMDLs for Indian River Lagoon).<sup>5</sup>

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<sup>2</sup> *See* National Marine Fisheries Service, Biological Opinion on EPA Approval of Water Quality Standards Under Section 303 of the Clean Water Act 3–4 (July 29, 2016) (detailing consultation history with NMFS).

<sup>3</sup> Letter from Annie Godfrey, Chief of EPA Water Quality Standards Section, to Larry Williams, FWS Field Office Supervisor South Florida Ecological Services Office (Dec. 20, 2012).

<sup>4</sup> Letter from Joanne Benante, EPA Water Quality Planning Branch, to Larry Williams, FWS Field Office Supervisor South Florida Ecological Services Office (Oct. 25, 2013).

<sup>5</sup> Letter from Joanne Benante, EPA Chief Water Quality Planning Branch, to Dr. Heath Rauschenberger, FWS North Florida Ecological Services Office (Feb. 8, 2017).

In each of its informal consultations with FWS, EPA concluded that its approval would not adversely affect the manatee,<sup>6</sup> and FWS agreed.<sup>7</sup>

### III. NEW INFORMATION REQUIRES REINITIATION OF CONSULTATION

FWS has already recognized that reinitiation of consultation is required here, asking EPA on August 10, 2021, to reinitiate consultation. *See* Letter from Larry Williams, Florida State Supervisor of FWS, to Tony Able, Chief, Water Quality Planning Branch, U.S. EPA (Aug. 10, 2021). However, upon information and belief, no such consultation has been reinitiated.

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<sup>6</sup> *See* Letter from Annie Godfrey, Chief of EPA Water Quality Standards Section to Larry Williams, FWS Field Office Supervisor South Florida Ecological Services Office (Dec. 20, 2012) (transmitting Biological Evaluation concluding that “[t]he EPA has determined that its approval of the addition of numeric criteria for springs, lakes, streams, and estuaries, which are primarily outlined within Rule 62-302, as well as the procedure for developing alternative criteria will not likely adversely affect or will beneficially affect listed species, critical habitat and food sources”); Letter from Joanne Benante, EPA Water Quality Planning Branch, to Larry Williams, FWS Field Office Supervisor South Florida Ecological Services Office (Oct. 25, 2013) (transmitting Biological Evaluation concluding that “[o]verall, the EPA has determined that the chemical, physical, and biological data and the scientifically sound approaches used to develop the [numeric nutrient criteria (“NNC”)] resulted in NNC that will provide for the protection of a healthy, well-balanced biological community and will ensure the protection of water quality and aquatic life. For all of these reasons, the EPA has determined that the NNC adopted by the State of Florida . . . are not likely to adversely affect listed species and that implementation of the NNC will avoid excessive concentrations of nutrients that can lead to the imbalance of flora and fauna”); Letter from Joanne Benante, EPA Chief Water Quality Planning Branch, to Dr. Heath Rauschenberger, FWS North Florida Ecological Services Office (Feb. 8, 2017) (noting that “EPA continues to arrive at a finding of [No Effect and Not Likely to Adversely Affect] for the unchanged list of FWS’s species of concern[.]”)

<sup>7</sup> *See* Letter from Larry Williams, FWS Florida State Supervisor, to Annie Godfrey, Chief of EPA Water Quality Standards Section 7 (July 31, 2013) (“the Service concurs with EPA’s determination that the revised nutrient standards are not likely to adversely affect the West Indian manatee or its critical habitat”); Letter from Larry Williams, FWS Field Supervisor South Florida Ecological Services Office, to Joanne Benante, EPA Water Quality Planning Branch (Nov. 15, 2013) (“The adopted TMDLs in the Indian River Lagoon contain [Total Nitrogen (“TN”)] and [Total Phosphorus (“TP”)] loading targets that were established to support the restoration of seagrass beds. Historical seagrass coverage was evaluated in conjunction with historic estimates of point and nonpoint nutrient inputs to establish TMDLs suitable for seagrass proliferation. Implementation of the TMDLs would result in significant reductions in TN (51 percent) and TP (47 percent) loading in the central Indian River Lagoon, which includes the segments within the [FWS South Florida Ecological Services Office] area of responsibility (TMDL 2009b)”); Letter from Jay B. Herrington, FWS Field Supervisor, to Joanne Benante, EPA Water Quality Planning Branch (May 3, 2017) (“the Service concurs with EPA’s determination that the changes made to the Florida’s statewide estuary-specific numeric nutrient criteria under review is not likely to adversely affect any federally listed species or their critical habitats”).

Three significant pieces of new information underscore the requirement for EPA to reinstitute consultation with FWS under 50 C.F.R. § 402.16 on Florida's estuary-specific numeric nutrient criteria. First, new information suggests mass die-offs of manatees in the Indian River Lagoon are due to deterioration in water quality as a result of continuing nitrogen and phosphorus pollution, calling into question the overall adequacy of the current TMDLs. As FWS has already recognized, this unprecedented die-off alone requires reinstitution of consultation. Second, new information suggests there is a lack of reasonable assurance that the current measures to reduce point and nonpoint source pollution will achieve expected load reductions. Third, and finally, new information indicates that the current TMDLs do not adequately take into account pollution from legacy muck, and therefore do not contain an adequate margin of safety.

**A. New Information Suggests Mass Die-Offs of Manatees are Due to Continuing Deterioration in Water Quality**

More than 1,000 manatees have died so far this year in Florida, with the majority on the Atlantic coast as part of an unprecedented die-off that has been officially declared an “Unusual Mortality Event” by the Working Group on Marine Mammal Unusual Mortality Events and FWS.<sup>8</sup> This represents roughly double the average number of deaths in years prior, and it is the most deaths ever recorded in a year.<sup>9</sup> The Florida Fish and Wildlife Conservation Commission estimates the total number of Florida manatees to have been 8,800 as of 2015–16, with roughly 4,000 on the Atlantic coast.<sup>10</sup> In other words, Florida has lost roughly 12% of its manatee population this year alone, and nearly 19% of the Atlantic population.<sup>11</sup>

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<sup>8</sup> See Florida Fish and Wildlife Conservation Commission, Marine Mammal Pathobiology Laboratory, 2021 Preliminary Manatee Mortality Table with 5-Year Summary From 01/01/2021 to 12/03/2021, *available at* <https://myfwc.com/media/25428/preliminary.pdf> (last visited Dec. 16, 2021) (stating that a total of 1038 manatees have died in Florida from 01/01/2021 to 12/03/2021); Florida Fish and Wildlife Conservation Commission, Manatee Mortality Event Along The East Coast 2020-2021, *available at* <https://myfwc.com/research/manatee/rescue-mortality-response/ume/> (last visited Dec. 15, 2021).

<sup>9</sup> *Id.*; see also Allen, As Seagrass Habitats Decline, Florida Manatees Are Dying Of Starvation, NPR (June 21, 2021), *available at* <https://www.npr.org/2021/06/21/1006332218/as-seagrass-habitats-decline-florida-manatees-are-dying-of-starvation> (last visited Dec. 1, 2021).

<sup>10</sup> Hostetler, et al., Updated Statewide Abundance Estimates for the Florida Manatee (2018), *available at* [https://f50006a.eos-intl.net/ELIBSQL12\\_F50006A\\_Documents/TR23-18Hostetler-USAEF.pdf](https://f50006a.eos-intl.net/ELIBSQL12_F50006A_Documents/TR23-18Hostetler-USAEF.pdf) (last visited Dec. 1, 2021).

<sup>11</sup> *Id.*; see also Florida Fish and Wildlife Conservation Commission, Manatee Mortalities on the Florida Atlantic Coast, Staff Report (Aug. 4, 2021), *available at* <https://www.wfla.com/wp-content/uploads/sites/71/2021/08/FWC-Manatee-Mortalities-Report.pdf> (last visited Dec. 16, 2021).

The majority of these deaths have occurred in the Indian River Lagoon, where a die-off of seagrass has left the manatees to starve to death.<sup>12</sup> The Indian River Lagoon is an estuary that includes Mosquito Lagoon, Banana River Lagoon, and the Indian River. It has more species of plants and animals than any other estuary in North America. The lagoon's seagrass includes Johnson's seagrass, a rare seagrass found only in lagoons on the east coast of Florida that was the first marine plant species to be listed under the ESA.<sup>13</sup> The seagrass in the lagoon formerly provided habitat and forage for many commercially, recreationally, and ecologically important species, including manatees, sea turtles, spotted sea trout, redfish (red drum), snook, tarpon, mullet, sheepshead, pompano, seahorses, blue crabs, hermit crabs, pink shrimp, scallops, clams, marine worms, marine snails, and other crustaceans.<sup>14</sup> Seagrass health is therefore not only critical to the survival of the manatee, but to the persistence of other threatened and endangered species of plants and wildlife, the health of commercially and recreationally important species, and the functioning of the ecosystem overall.

The die-off of seagrass is directly related to deteriorating water quality in the Indian River Lagoon.<sup>15</sup> As human development has increased around the Indian River Lagoon, so has the input of nitrogen and phosphorus from wastewater treatment discharges, leaking septic systems, and stormwater runoff carrying nitrogen fertilizer, among other sources. These nutrients, in turn, feed algae super outbreaks, which block light from getting to the seagrass, causing it to die.<sup>16</sup>

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<sup>12</sup> See Memorandum from Gil McRae, Director, Fish and Wildlife Research Institute, to Florida Fish and Wildlife Conservation Commissioners re: Staff Report – Unusual Manatee Mortality along the Florida Atlantic coast (Aug. 4, 2021) (“This unusual mortality event has been attributed to the effects of starvation tied to lack of suitable forage availability associated with winter aggregation at warm water sites.”); Lefebvre et al., Characterizing Manatee habitat use and seagrass grazing in Florida and Puerto Rico: implications for conservation and management, *Pacific Conservation Biology* Vol 5: 289–98 (2000) (explaining the importance of seagrass to manatee diets).

<sup>13</sup> National Marine Fisheries Service, Final Recovery Plan for Johnson's Seagrass (Sept. 2002).

<sup>14</sup> See U.S. Fish and Wildlife Service, Indian River Lagoon, *available at* [https://www.fws.gov/refuge/pelican\\_island/wildlife\\_and\\_habitat/indian\\_river\\_lagoon.html](https://www.fws.gov/refuge/pelican_island/wildlife_and_habitat/indian_river_lagoon.html) (last visited Oct. 12, 2021); St. Johns River Water Management District, Indian River Lagoon: An Introduction to a National Treasure (2007).

<sup>15</sup> See Memorandum from Gil McRae, Director, Fish and Wildlife Research Institute, to Florida Fish and Wildlife Conservation Commissioners re: Staff Report – Unusual Manatee Mortality along the Florida Atlantic coast (Aug. 4, 2021) (“Seagrass losses in the Indian River Lagoon have been significant due to continuing water quality issues.”).

<sup>16</sup> See, e.g., Lapointe, et al., Nutrient Over-Enrichment and Light Limitation of Seagrass Communities in the Indian River Lagoon, an Urbanized Subtropical Estuary, *Science of the Total Environment* 699 (2020). This deteriorating water quality has also led to other effects on protected species. For instance, a 2021 article found a strong correlation between water pollution in the Indian River Lagoon and the prevalence of tumors in endangered green sea turtles. See Sposato, et al., Evaluation of Immune Function in Two Populations of Green Sea Turtles (*Chelonia mydas*) in a Degraded Versus a Nondegraded Habitat, *J. Wildlife Diseases* 57(4):761-772 (2021).

As FWS has already recognized, the continued deterioration in water quality—leading to algae outbreaks “that have increased in frequency and duration” and have caused the recent unusual manatee mortality event—require reinitiation of consultation under 50 C.F.R. § 402.16(a)(2) on EPA’s approval of the numeric nutrient criteria for water quality standards in estuaries. *See* Letter from Larry Williams, Florida State Supervisor of FWS, to Tony Able, Chief, Water Quality Planning Branch, U.S. EPA (Aug. 10, 2021). Despite FWS’s call for reinitiation, however, available information indicates that to date neither agency has formally reinitiated ESA consultation. *See id.* (asking EPA to reinitiate consultation, without itself formally reinitiating consultation). Given the continued water quality deterioration and increasing die-off of manatees, EPA must immediately reinitiate consultation to address the Unusual Mortality Event and to reconsider whether the current TMDLs are adequate to protect the manatee. As discussed below, significant new information indicates they are not.

## **B. New Information Suggests a Lack of Reasonable Assurances that Point and Nonpoint Source Reductions Will Achieve Expected Load Reductions**

In addition to the recent unprecedented die-off of manatees, a growing record of inadequate efforts to comply with and enforce existing water-quality safeguards also necessitates reinitiation of consultation. For EPA to approve a TMDL, EPA must determine that the TMDL provides reasonable assurances that point and nonpoint source control measures will achieve expected load reductions.<sup>17</sup> Lax enforcement and compliance for both point and nonpoint sources suggests that the current TMDLs are ineffective at controlling nutrients into the Indian River Lagoon. EPA must therefore reinitiate consultation to consider this new information suggesting that the current TMDLs are not being effectively implemented and that the TMDLs lack reasonable assurances they will achieve load reductions. *See* 50 C.F.R. § 402.16(a)(1), (3).

### **1. Recent Reports Suggest Current Stormwater and Wastewater Treatment Facilities Fail to Meet the Presumption that they Achieve Expected Load Reductions**

Several recent reports indicate that point source control measures and enforcement are inadequate, suggesting that the TMDLs must be revisited to ensure that they provide reasonable assurances that the wasteload allocation from point sources will be achieved.

First, in 2019, a “Blue-green Algae Task Force,” appointed by Governor DeSantis to aid the Florida Department of Environmental Protection, concluded that “[t]he presumption that a stormwater treatment system constructed and permitted in compliance with [best management

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<sup>17</sup> *See* 40 C.F.R. 122.44(d)(1)(vii)(B) (requiring effluent limits in permits be consistent with “the assumptions and requirements of any available wasteload allocation” in an approved TMDL); EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 at 4 (May 20, 2002), *available at* [https://www.epa.gov/sites/default/files/2015-10/documents/2002\\_06\\_04\\_tmdl\\_guidance\\_final52002.pdf](https://www.epa.gov/sites/default/files/2015-10/documents/2002_06_04_tmdl_guidance_final52002.pdf) (last visited Nov. 30, 2021) (explaining that when waters are impaired by both point and nonpoint sources, “the TMDL should provide reasonable assurances that nonpoint source control measures will achieve expected load reductions in order for the TMDL to be approvable”).

practice] design criteria will not cause or contribute to violations of surface water quality standards in adjacent and/or connected waterbodies has been evaluated and challenged. Available data suggest that a substantial number of stormwater treatment systems throughout the state fail to achieve their presumed performance standards.” Blue-green Algae Task Force, DRAFT consensus Document #1 Final Draft – Revised 3 October 2019. The Task Force recommended “the development and implementation of a stormwater system inspection and monitoring program with the goal of identifying improperly functioning and/or failing systems so that corrective action can be taken to reduce nutrient pollution and other negative environmental impacts.” *Id.* It further recommended “that stormwater design criteria be revised and updated to incorporate recent advances in stormwater treatment technologies and other practices that have demonstrated environmental benefits; nutrient reduction specifically.” *Id.*

Second, a 2018 review of sewage pollution in the Indian River Lagoon suggested that harmful algae outbreaks are initiated and expanded by wet weather discharges from municipal wastewater treatment facilities. *See* Barile, Widespread Sewage Pollution of the Indian River Lagoon System, Florida (USA) Resolved by Spatial Analyses of Macroalgal Biogeochemistry, *Marine Pollution Bulletin* 128 (2018). The article explained that although direct surface water discharges of treated human wastewater effluent are prohibited, up to 90 days per year of “emergency wet weather” surface discharges are allowed when significant rain events overload the treatment system capacities. *Id.* at 559; *see also* Indian River Lagoon Act, Chapter 90-262 Laws of Florida, Sec. 2(c) (allowing wet weather discharges). The article posits that these poorly reported wet weather discharges—which can be several million liters per day per treatment plant during wet season events—may be a key factor supporting harmful algal outbreaks. Barile at 560, 572. The article suggests that significant wastewater treatment infrastructure upgrades, including conversion of municipal wastewater treatment plants to high nutrient removal advanced wastewater treatment, as well as mandatory septic-to-sewer conversion, are needed for seagrass regrowth in the Indian River Lagoon. *Id.* at 572.<sup>18</sup>

Finally, a 2020 Florida Public Employees for Environmental Responsibility (“Florida PEER”) report disclosed that Brevard County had 38 instances of unpermitted sewage discharges, totaling 552,040 gallons discharged. *See* Florida PEER, Report on Enforcement Efforts by the Florida Department of Environmental Protection (2020), *available at* <https://www.peer.org/2020-florida-enforcement-report/> (last visited Dec. 1, 2021). Florida PEER also reported that the Florida Department of Environmental Protection conducted fewer inspections in 2020 than in previous years, and that the severity of fines decreased. Moreover, the “the enforcement actions used by the FDEP were largely short-form consent orders that required nothing more than paying a penalty, i.e., the traffic ticket approach.” *Id.* at 35. As Florida PEER Director Jerry Phillips explained, “[r]ather than seeking major reductions in our pollution load, DEP’s reliance on small fines makes pollution an acceptable cost of doing business.” *See* Florida PEER, Press Release, Florida Pollution Enforcement Fell into Covid Coma, (Sep. 15, 2021) *available at* <https://www.peer.org/florida-pollution-enforcement-fell->

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<sup>18</sup> *See also* Lapointe, et al., Evidence of Sewage-Driven Eutrophication and Harmful Algal Blooms in Florida’s Indian River Lagoon, 43 *Harmful Algae* 82–102 (March 5, 2015) (suggesting that seagrass loss due to pollution from sewage indicates the need for improved sewage collection and treatment).

into-covid-coma/ (last visited Dec. 1, 2021). This information thus suggests that lax enforcement of unpermitted sewage discharges could be further contributing to nitrogen and phosphorous pollution in the Indian River Lagoon.<sup>19</sup>

EPA must thus reinitiate consultation with FWS under 50 C.F.R. § 402.16 to take into consideration these recent reports demonstrating the lack of reasonable assurances that point source discharge control measures will achieve required load reductions.

## **2. The TMDL Lacks Reasonable Assurances that the Agricultural Best Management Practices Designed to Control Nonpoint Source Pollution Are Sufficient and Achievable**

In addition to recent information indicating that point source discharge controls do not provide reasonable assurances that load reductions will be achieved, further new information suggests that nonpoint sources present an additional source of pollution that is inadequately addressed. Agricultural nonpoint sources are a significant contributor of nitrogen and phosphorous into the Indian River Lagoon. *See* FDEP, Central Indian River Lagoon Basin Management Action Plan 17 (Feb. 2021) (“CIRL BMAP”). To address these nonpoint sources, the FDEP has created three Basin Management Action Plans (“BMAPs”), dividing up the Indian River Lagoon into three subbasins: (1) the Central Indian River Lagoon; (2) the North Indian River Lagoon (“NIRL BMAP”); and (3) the Banana River Lagoon (“BRL BMAP”). These BMAPs include agricultural best management practices (“BMPs”) that are aimed at reducing nitrogen and phosphorus runoff from agricultural practices. Under Florida law, it is the agricultural landowner’s responsibility to implement the BMPs, and landowners who do not enroll in the BMP Program are supposed to be referred to FDEP for enforcement action.

Unfortunately, however, current landowner enrollment in the BMP program is very low: only 25% of agricultural acres are currently enrolled in the Central Indian River Lagoon, *see* CIRL BMAP at 153; only 6% are enrolled in the North Indian River Lagoon, *see* NIRL BMAP at 27; and 0% are enrolled in the Banana River Lagoon, *see* BRL BMAP at 22. This is far below the current average of 62% enrollment in the BMP Program statewide, and 82% enrollment of irrigated agricultural acres statewide. *See* Florida Department of Agriculture and Consumer Services, Office of Agricultural Water Policy, Status of Implementation of Agricultural Nonpoint Source Best Management Practices 2 (July 1, 2021). Moreover, although Florida Department of Agriculture and Consumer Services (“FDACS”) is required to verify that landowners are properly implementing BMPs, including by conducting site visits every two years, FDACS conducted relatively few site visits to the Indian River Lagoon in 2020: only 91 out of 2,824 total visits statewide. *See id.* at 17. Furthermore, of the more than 6,600 referrals statewide from FDACS to FDEP for enforcement for agricultural producers not following the

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<sup>19</sup> *See also* Waymer and Vazquez, Sewage spill keep taxing Indian River Lagoon, other waters; state issues fines, but is that enough?, Florida Today (Aug. 15, 2019). In late 2020, more than seven million gallons of raw sewage spilled into a pond at Sand Point Park that flows directly into the Indian River Lagoon, resulting in a fish die-off. *See* Vazquez, Protestors call for action in Titusville after raw sewage spill into Indian River Lagoon, Florida Today (Jan 9, 2021); Waymer, Titusville sewage fallout could top half a million, Florida Today (May 7, 2021).

rules, none have faced penalties.<sup>20</sup> As Florida Agricultural Commissioner Nikki Fried described the situation in August, 2021, “[u]nfortunately we have not seen a hammer come down from FDEP. . . . There’s a carrot and there’s a stick. [FDACS] is the carrot, and FDEP is the stick. And the stick’s not working.”<sup>21</sup>

Finally, although the BMAPs intend to increase enrollment over time, the BMAPs do not aim to achieve full targeted load reductions until 2035, *see, e.g.*, CIRL BMAP at 16. This lengthy trajectory, coupled with the currently low enrollment by agricultural landowners in the BMP Program and lack of meaningful enforcement, is inappropriate and insufficient given the current ecological collapse of the Indian River Lagoon. EPA must therefore reinitiate consultation with FWS to consider new information demonstrating that the current enrollment and enforcement of BMPs, and planned trajectory of nitrogen and phosphorus reductions, has been insufficient to prevent seagrass and manatee die-offs, and that there are presently insufficient assurances that the measures to reduce nonpoint source pollution in the TMDLs will achieve expected load reductions.

### **C. New Information Suggests the TMDLs Overlook, and Should Take into Account, Ongoing Contributions of Nitrogen and Phosphorous from Legacy Pollution**

New information also highlights the important role that legacy pollution plays in the ecosystem collapse that is underway in the Indian River Lagoon, yet the existing TMDLs fail to account for this factor. Over time, the harmful levels of nutrients entering the Indian River Lagoon have led to muck accumulation on the lagoon bottom, which “fluxes” nutrients back into the lagoon. There are an estimated 5 million cubic yards of muck within the Indian River Lagoon, delivering roughly 30% of the total nutrient load.<sup>22</sup> Brevard County recently posited that “[n]itrogen and phosphorus released each year as muck decays are now larger than any current source of nutrient pollution to lagoon waters.” Tetra Tech, Inc. and CloseWaters LLC. (2021) Save Our Indian River Lagoon Project Plan 2021 Update for Brevard County, Natural Resources Management Department Brevard County, Florida. Not only does legacy muck contribute to

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<sup>20</sup> *See* Chesnes, Ag Commissioner Nikki Fried wants boots on the ground to measure, reduce pollution, TCPalm (Aug. 4, 2021), *available at* <https://www.tcpalm.com/story/news/local/indian-river-lagoon/2021/08/04/nikki-fried-visits-sewalls-point-discuss-clean-water-initiative/5452933001/> (last visited Dec. 1, 2021).

<sup>21</sup> *Id.* *See also* MacLaughlin, Will Basin Management Action Plans Restore Florida’s Impaired Waters?, 89 Fla. B. J. 31 (Feb. 2015) (suggesting that BMAPs “need more regulatory teeth if they are to succeed”); Blue-green Algae Task Force, DRAFT consensus Document #1 Final Draft – Revised (Oct. 3, 2019) (“[T]he [Blue-green Algae Task Force] recommends that the effectiveness of BMPs be supported by adequate data to justify the presumption of compliance granted upon enrollment and implementation”).

<sup>22</sup> Fox and Tefry, Lagoon-wide Application of the Quick-Flux Technique to determine Sediment Nitrogen and Phosphorus Fluxes, Submitted to Brevard County, Fl. Natural Resources Management Department (June 2019); *see also* Tetra Tech, Inc. and CloseWaters LLC., Save Our Indian River Lagoon Project Plan 2021 Update for Brevard County, Natural Resources Management Department Brevard County, Florida (Feb. 2021), *available at* <https://www.brevardfl.gov/SaveOurLagoon/ProjectPlan> (last visited on Dec. 1, 2021).

nitrogen and phosphorus pollution, but it can result in resuspension of sediment which decreases light availability to seagrass and further contributes to seagrass loss.<sup>23</sup> It can also cover the natural bottom of the lagoon so that the seagrass is unable to grow.<sup>24</sup>

EPA's TMDL guidance explains that TMDL submittals should identify all "point and nonpoint sources of the pollutant of concern, including the location of the source(s) and the quantity of the loading" in order for EPA to adequately review the load and wasteload allocations and develop an adequate margin of safety "to account for any lack of knowledge concerning the relationship between load and wasteload allocations and water quality." EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 at 1, 4 (May 20, 2002). But despite the outsize importance of this legacy muck as a pollution source, legacy inputs were not accounted for in the nitrogen and phosphorus TMDLs and the "Spatial Watershed Iterative Loading or 'SWIL' Model"—the model that calculates the load allocations for the Indian River Lagoon BMAPs—does not take this legacy muck into account. *See, e.g.*, NIRL BMAP at 39.

Without addressing legacy muck, it is likely that algal outbreaks and seagrass loss will continue.<sup>25</sup> EPA must therefore reinitiate consultation with FWS in light of evidence that the current TMDLs lack an adequate margin of safety that takes into account the nutrient and sediment contributions of legacy pollution.

#### IV. CONCLUSION

The ESA authorizes citizen suits to enjoin violations of the ESA. 16 U.S.C. § 1540(g)(1)(a). As set forth above, EPA is in violation of the ESA for failing to reinitiate formal consultation with FWS concerning EPA's approval of Florida's estuary-specific numeric nutrient criteria in light of recent manatee mortality and new information suggesting that the current numeric nutrient standards are insufficient to protect against the current manatee die-off as well as protect against future mortality events. If EPA is unwilling to take action within sixty days to reinitiate consultation, we plan to seek redress through litigation.

Sincerely,

Elizabeth Forsyth  
Earthjustice Biodiversity Defense Program

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<sup>23</sup> Philips, Factors Affecting the Abundance of Phytoplankton in a Restricted Subtropical Lagoon, The Indian River Lagoon, Florida, USA, *Estuarine, Coastal and Shelf Science* (Sep. 2002).

<sup>24</sup> Florida Tech, Florida Tech Scientists and Engineers Seek Answers for Muck in the Indian River Lagoon (Aug. 13, 2017); Waymer, Muck: The arch-enemy lurks deep in Indian River Lagoon – Muck problem expensive to solve, *Florida Today* (Nov. 24, 2013).

<sup>25</sup> *See* Missimer, et al., Legacy Phosphorus in Lake Okeechobee (Florida, USA) Sediments: A Review and New Perspective, *Water* (2021) (explaining that in Lake Okeechobee, "[d]espite major efforts to control external nutrient loading into the lake, the high frequency of algal blooms will continue until the muds bearing legacy nutrients are removed from the lake").

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January 24, 2022

Ms. Stel Bailey  
Executive Director, Fight For Zero  
stel@fight4zero.org

Dear Ms. Bailey,

Thank you for your December 21, 2021 email to Michael S. Regan, Administrator of the U.S. Environmental Protection Agency, regarding a record number of manatee deaths in the Indian River Lagoon (IRL) and elsewhere along Florida's Space Coast. Your email was forwarded to the EPA Region 4 office in Atlanta, Georgia, for response.

In your email, you reference the starvation of the manatee in the northern Indian River Lagoon at an alarming rate due to the loss of seagrass from persistent algal blooms fed by sewage pollution. The EPA acknowledges your concern and has been engaging with the state of Florida and the U.S. Fish and Wildlife Service to expedite water quality improvements and seagrass restoration in the IRL.

In addition to exploring new efforts, the EPA has several existing programs that help implement nutrient load reductions and seagrass restoration. The programs and the relevant activities led by those programs are described below.

***National Estuary Program (NEP)***

The Indian River Lagoon National Estuary Program (IRLNEP) is designated as an "Estuary of National Significance" with authorization under Section 320 of the Clean Water Act (CWA) and administered by the EPA. The EPA provides certain funding to the NEPs and collaborates with the NEPs as they develop Comprehensive Conservation and Management Plans (CCMPs) to address challenges and set priorities related to water quality and living resources in the NEP. The IRLNEP revised its CCMP in 2009, "Looking Ahead to 2030: A 10-Year CCMP for the Indian River Lagoon, Florida," to respond to new vulnerabilities and emerging threats. The annual funding provided by the EPA, recently totaling \$700,000, must support restoration, scientific research and citizen engagement projects. Since 2015, the IRLNEP has directed \$360,000 towards enhancing seagrass restoration and plantings.

In addition, the IRL Council, an independent special district of Florida and IRLNEP, supports the evaluation of infrastructure projects that may improve water flow and decrease the vulnerability of the IRL to nutrient pollution.

### ***National Pollutant Discharge Elimination System (NPDES) Permitting Program and Clean Water Act State Revolving Fund (CWSRF)***

Florida has primacy for the NPDES permitting program and issues permits to point sources discharging pollutants that cause or contribute to water quality impairments affecting among other things, sea grasses and manatees. These permits are another tool to address nutrient pollution, thereby improving water quality and seagrass health.

The EPA provides capitalization grants to Florida and other states for their Clean Water Act State Revolving Fund programs (CWSRF) which can also be used for improving water quality. In fiscal year 2021, the CWSRF grant to the state of Florida was \$53,633,000. Florida uses its CWSRF assistance in the form of loans to municipalities for infrastructure projects to permitted facilities discharging pollutants of concern. Florida can also use its CWSRF to support nonpoint source management projects, which have the potential for cost-effective reductions in nutrient pollution, which lead to improvements in seagrass habitat.

President Biden also signed the Bipartisan Infrastructure Law (BIL) on November 15, 2021. This is a big and bold investment in our nation's infrastructure, and the law's investment in water is nothing short of transformational. It includes \$50 billion in EPA grant funds to strengthen the nation's drinking water and wastewater systems - the single largest investment in water that the federal government has ever made. Florida's BIL State Revolving Fund allotment in fiscal year 2022 is an estimated \$275,420,000. The BIL also provides an unprecedented level of funding dedicated to addressing perfluoroalkyl and polyfluoroalkyl substances (PFAS) and other emerging contaminants. States can use the BIL resources to provide relief to communities on the front lines of per- and polyfluoroalkyl Substances (PFAS) contamination and to address water quality issues.

### ***Nonpoint Source Management Program***

Section 319 of the CWA established the Nonpoint Source (NPS) Management Program to support state and local NPS. Under Section 319, state programs such as Florida's NPS Management Program receive annual federal grant funds to implement their Management Plan by using a balanced approach of education, research, technical assistance, financial incentives, regulation and partnerships. Florida reviews and revises its NPS priorities periodically to address the common NPS pollution categories in Florida: runoff or leaching from agriculture lands; habitat and hydrologic alteration; erosion and sedimentation from unvegetated lands, construction sites, or unpaved roads; onsite sewage treatment and disposal systems, or septic tanks; and stormwater sheet-flow runoff especially from highly urban areas. The annual federal grant funding provided to support the State's program is approximately \$6 million but depends on appropriations. The State accepts project proposals from its program partners year-round. Since 2017, there has been approximately \$2.6 million in NPS funding and over \$1.5 million in non-federal funding that was leveraged in the IRL for projects addressing restoration, septic and sewer conversion, and stormwater issues, all of which can contribute to nutrient pollution and impact seagrass. These projects resulted in the reduction of more than 2,315 lbs/year of total nitrogen and 308 lbs/year of total phosphorous. The reductions in nutrients will result in improvement in seagrass habitat. The EPA will continue working with the state as it implements its NPS Management Program.

### ***South Florida Program***

The EPA South Florida Program awards competitive grants to address the immediate and emerging ecological pressures and threats to waters central to South Florida's economic well-being. The program offers an open competition for applicants to apply for EPA funding for projects meeting the resource

management goals and objectives identified in resource management programs and initiatives within South Florida. EPA solicitations and award decisions are evaluated based on identified priorities; documentation of ecological urgency; connections to resource strategic goals and management plans; demonstrated partnerships and collaboration; innovative restoration techniques; geographic location; and quantifiable improvements to water quality and marine ecology. In the most recent EPA South Florida Request for Applications solicitations, the program targeted projects that reduced nutrients and impacts from harmful algal blooms; increased and enhanced water quality and seagrass monitoring; and promoted habitat restoration that included seagrass. In 2020, the South Florida Program funded two projects that support nutrient monitoring and modeling. This year, the program has selected three projects: to develop a water quality analysis tool, demonstrate algal bloom reduction technology and conduct seagrass restoration in the IRL area.

On another topic, we greatly appreciate your efforts to meet with Administrator Regan as we work to implement our *PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024*, released in October 2021. The work you are doing with the University of Florida to better understand how PFAS may be impacting waterways and manatees will provide additional information to all those working to ensure protection of Florida waterways and the manatees. In addition, I wanted to summarize some of the other efforts EPA has underway to address PFAS:

***Publish final recommended ambient water quality criteria for PFAS***

The EPA intends to develop national recommended ambient water quality criteria for PFAS to protect aquatic life and human health. Tribes and states can use EPA-recommended water quality criteria to develop water quality standards to protect and restore waters, issue permits to control PFAS discharges, and assess the cumulative impact of PFAS pollution on local communities. The EPA will publish recommended aquatic life criteria for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) and benchmarks for other PFAS that do not have sufficient data to define a recommended aquatic life criteria value. The EPA will first develop human health criteria for PFOA and PFOS, taking into account drinking water and fish consumption. This initiative will consider the latest scientific information and will develop human health criteria for additional PFAS when final toxicity assessments are available. Freshwater aquatic life criteria for PFOA and PFOS are expected in Winter 2022, and human health criteria are expected Fall 2024.

***Issue new guidance to state permitting authorities to address PFAS in NPDES permits***

The EPA will issue new guidance recommending that state-issued permits that do not already include monitoring requirements for PFAS use EPA's recently published analytical method 1633, which covers 40 unique PFAS, at facilities where PFAS is expected or suspected to be present in wastewater and stormwater discharges. The guidance will enable communities to work closely with their state permitting authorities to suggest monitoring at facilities suspected of containing PFAS.

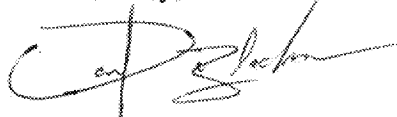
***Restrict PFAS discharges from industrial sources through a multi-faceted Effluent Limitations Guidelines program (ELGs)***

ELGs are a powerful tool to limit pollutants from entering the nation's waters. ELGs establish national technology-based regulatory limits on the level of specified pollutants in wastewater discharged into surface waters and into municipal sewage treatment facilities. The EPA has been conducting a PFAS multi-industry study to inform the extent and nature of PFAS discharges. Based on this study, the EPA is taking a proactive approach to restrict PFAS discharges from multiple industrial categories. The EPA plans to make significant progress in its ELG regulatory work by the end of 2024. The EPA's multi-faceted approach entails:

- Undertake rulemaking to restrict PFAS discharges from industrial categories where the EPA has the data to do so including the guidelines for organic chemicals, plastics and synthetic fibers (OCPSF), metal finishing, and electroplating. Proposed rule is expected in Summer 2023 for OCPSF and Summer 2024 for metal finishing and electroplating.
- Launch detailed studies on facilities where EPA has preliminary data on PFAS discharges, but the data are currently insufficient to support a potential rulemaking. These include electrical and electronic components, textile mills, and landfills. EPA expects these studies to be complete by Fall 2022 to inform decision making about a future rulemaking by the end of 2022.
- Initiate data reviews for industrial categories for which there is little known information on PFAS discharges, including leather tanning and finishing, plastics molding and forming, and paint formulating. EPA expects to complete these data reviews by Winter 2023 to inform whether there are sufficient data to initiate a potential rulemaking.
- Monitor industrial categories where the phaseout of PFAS is projected by 2024, including pulp, paper, paperboard, and airports. The results of this monitoring, and whether future regulatory action is needed, will be addressed in the Final ELG Plan 15 in Fall 2022.

We hope that you find this information useful. Thank you again for your interest in protecting the manatee and the health of the Florida ecosystem. If we may be of further assistance, please contact me or Ms. Brandi Jenkins, Director of our Outreach and External Engagement Office at (404) 562-8327 or by email at [jenkins.brandi@epa.gov](mailto:jenkins.brandi@epa.gov).

Sincerely,

A handwritten signature in black ink, appearing to read 'Daniel Blackman', written over a horizontal line.

Daniel Blackman  
Regional Administrator

Tue Dec 21 10:04:59 EST 2021  
EPAExecSec <EPAExecSec@epa.gov>  
FW: PFAS in Manatee's Blood & Record Number of Manatee Deaths on Florida's Space Coast  
To: "CMS.OEX" <cms.oex@epa.gov>; "Gaines, Cynthia" <Gaines.Cynthia@epa.gov>; "Moritz, Brigitte" <Moritz.Brigette@epa.gov>

---

Reading file

**From:** stel@fight4zero.org <stel@fight4zero.org>  
**Sent:** Tuesday, December 21, 2021 9:49 AM  
**To:** Regan, Michael <Regan.Michael@epa.gov>  
**Cc:** governorrn.desantis@eog.myflorida.com; eleni\_valanos@rubio.senate.gov; Valenta, Valentina <valentina.valenta@mail.house.gov>; aaron.watkins@floridadep.gov; helena.dacnav@floridaadep.gov  
**Subject:** PFAS in Manatee's Blood & Record Number of Manatee Deaths on Florida's Space Coast

December 21, 2021

Michael Regan  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington DC 20004

Dear Administrator Regan,

Earlier this year, I met with you and your staff to share our communities exposure to PFAS and the devastating health effects my family experienced from the space industry and Department of Defense pollution in my hometown.

We are experiencing a record number of manatee deaths, and 75% of them are in my backyard. Florida's Space Coast is watching as manatees die of starvation in the northern Indian River Lagoon at an alarming rate due to the loss of seagrass from persistent algal blooms fed by sewage pollution. Over 1,000 Florida manatees have already died this year, well over the state's average.

**PFAS is in the manatee's blood at the highest levels of toxic fluorinated chemicals ever measured in the species in the northern lagoon, where they are perishing at a rapid rate.**

Pollution has deteriorated our water quality, and we are watching the effects of that every day as we document this catastrophic manatee mortality event. We began to witness the decline in the late summer of 2020 and tried to warn local government agencies of the massive algal bloom we were documenting. In December 2020, we learned that over 7 million gallons of sewage spilled in the exact location and barely any accountability from the Florida Department of Environmental Protection. Not long after, we started seeing deceased manatees begin washing onto our shores.

After learning that my family was exposed to cancer-causing chemicals from the space industry and the Department of Defense, I founded Fight For Zero, a nonprofit organization fighting for zero pollution in our ecosystem. I went from a young girl with memories of a thriving ecosystem filled with fish, wildlife, seahorses, and seagrass to a cancer survivor watching the people I grew up with get sick and our lagoon become a desolate desert. I formed this organization for resources, scientific studies and to empower our community with knowledge and tools to take on these challenges.

In your speech announcing the comprehensive strategic roadmap to confront PFAS contamination, you spoke of advocacy groups like ours playing an important role and your desire to have a continued partnership. Our organization is working with the University of Florida on an EPA-funded three-year study on PFAS testing the waterways where these manatees are dying. Our goal has always been simple, clean water and healthy communities.

There has been an erosion of trust with our local government and the agencies tasked to protect us here in Florida. This pollution is a daunting and dire situation as we witness its impacts on our wildlife and health.

We request a meeting to learn more about how the EPA can address this crisis. We have urged the state of Florida and our agencies to consider the following recommendations:

- 24/7 wildlife monitoring cameras installed in areas where these conservation efforts are taking place so that the community can watch without disturbing these agencies in person as they work on this overwhelming task to save the manatees.
- Give biologists the capability to do more in-depth necropsies on the manatees that would test for pollution such as glyphosate and DDT and from the space industry and Department of Defense's activities with PFAS.

- Oversee the manatee feeding plans, which have not begun. At least one manatee a day is dying, and that's without a cold front.

Furthermore, we urge the EPA to consider allocating federal funding to address our septic tanks and wastewater treatment systems operating within the north Indian River Lagoon, where high concentrations of human feces are discharged into the lagoon.

It will take 1 billion dollars to make a meaningful impact. In August of 1977, the EPA reported on the environmental effect of the septic tank system and recommended no more than one septic tank per 16 acres in regions with sandy soils and high water tables. The science showed the negative impacts of septic tank systems on groundwater quality and the movement of pollutants in both unsaturated and saturated subsurface environments. Our state turned our waterways into a toilet. They knew for 40 years that Florida is not appropriate for intense septic tank development.

Lastly, we know and understand that the manatees will continue to die. When I fought cancer in 2013 alongside my uncle, brother, and father, I never imagined I'd spend seven years learning about harmful pollution coming from the space industry or the Department of Defense or that I would dedicate my life to working on environmental health.

I want to honor those we've lost in our communities by giving our children a chance to see waterways filled with seagrass and life again. Will the EPA stand alongside our community to do this?

I look forward to hearing from your office.

Sincerely,

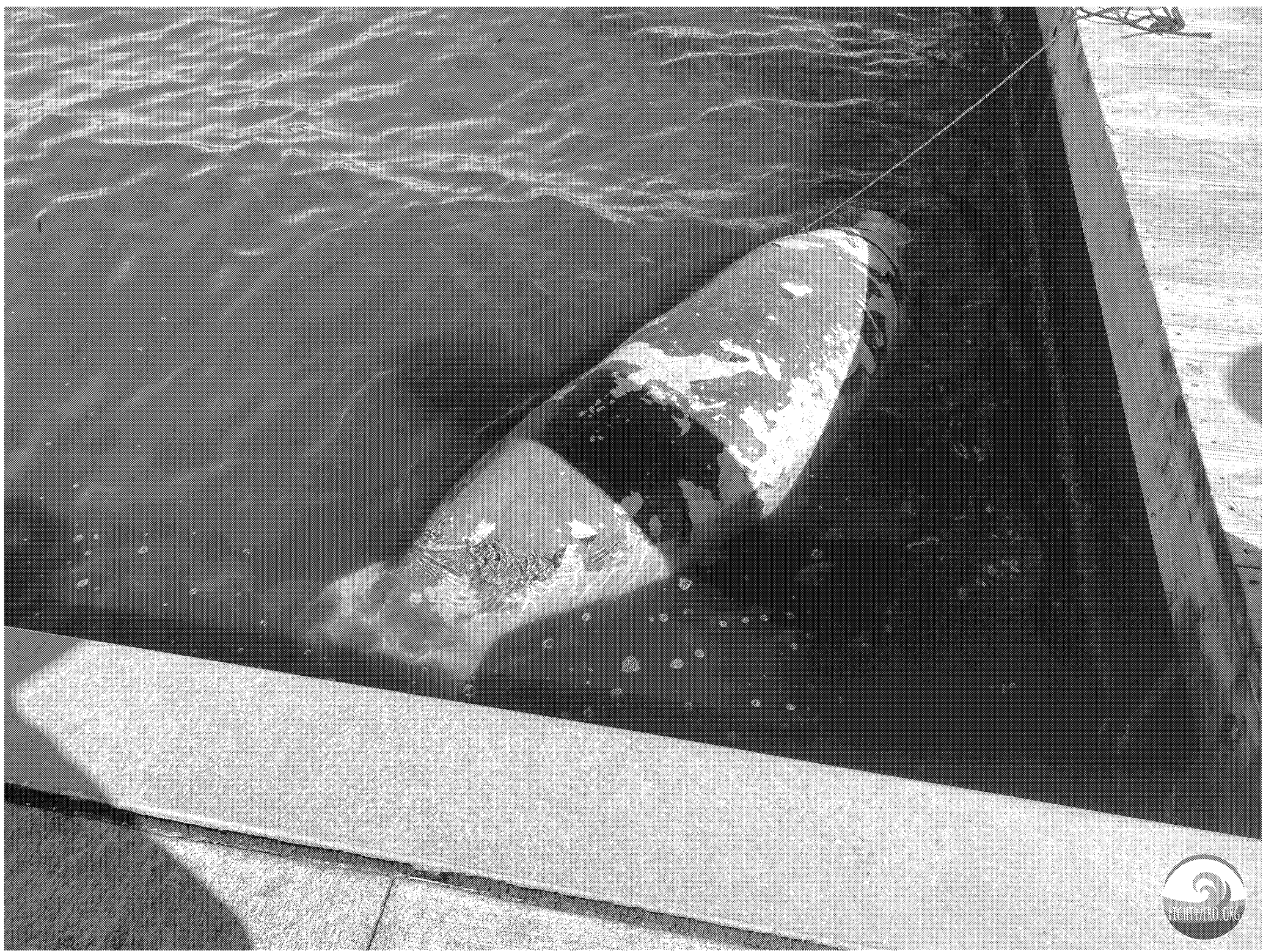
Stel Bailey  
Executive Director, Fight For Zero  
Cocoa, Florida 32927  
[stel@fight4zero.org](mailto:stel@fight4zero.org)  
321-289-0280  
[www.fight4zero.org](http://www.fight4zero.org)

1. PFAS Manatee Blood:

<https://conference.ifas.ufl.edu/marinemammal18/presentations/Thursday/1340%20John%20Bowden.pdf?fbclid=IwAR28IfVnFc3shlyVxPZKWplhLVzF3jveACbxBwUAWasPV9K80G5Qeu1lcmM>

1. August 1977 Environmental Effects of Septic Tank Systems study by Robert S. Kerr Environmental Research Laboratory.









# NOTICE



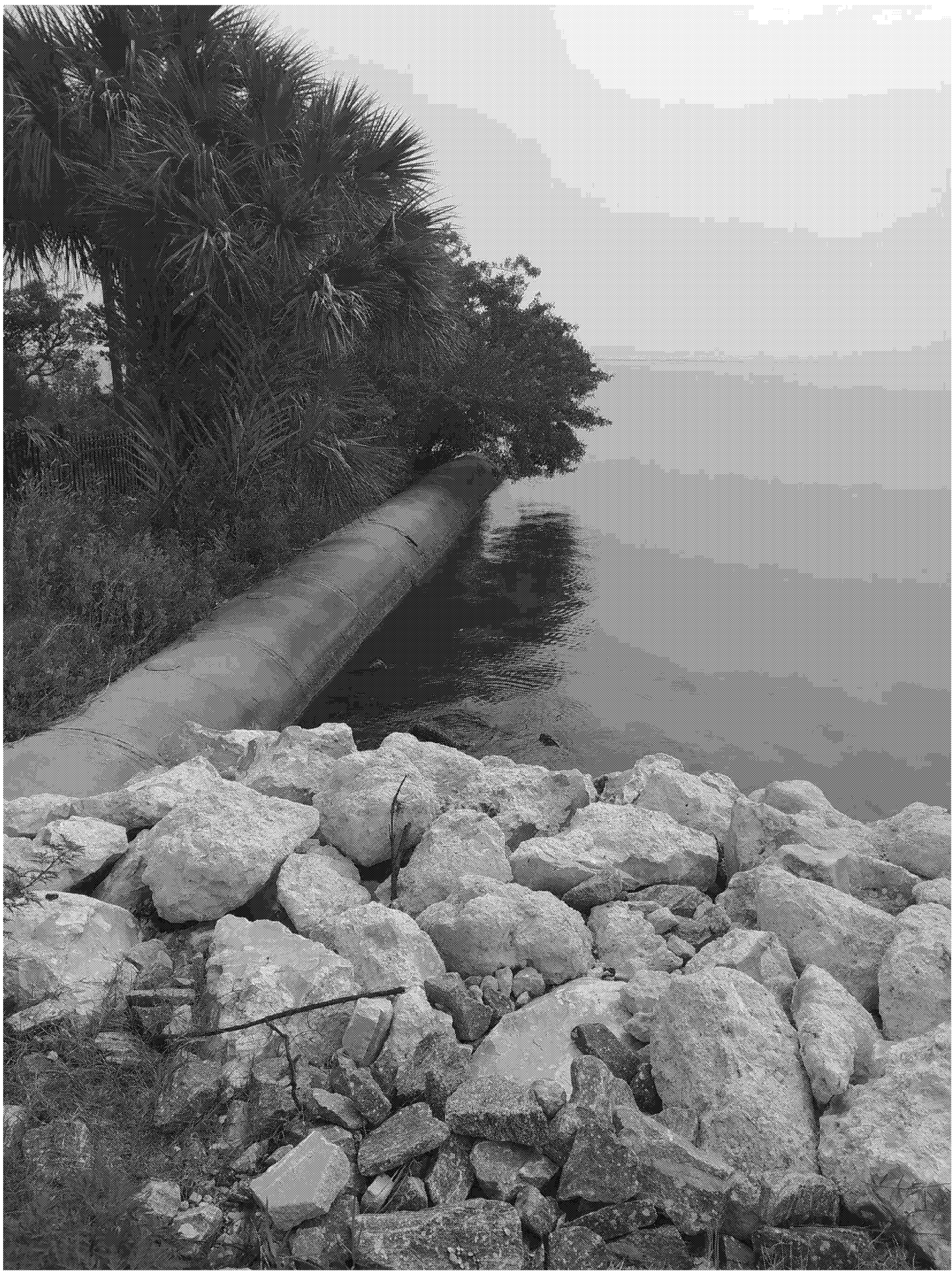
**This area is closed for all swimming,  
boating and fishing until further notice.**

**Recent contamination as a result of a sanitary  
sewer force main break may have made this area  
unsafe to use.**

**Please Contact  
City of Titusville  
Water Resources Department  
321-567-3855**













Message

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**Sent:** 4/7/2023 2:11:13 PM  
**To:** Ward, Nacosta [Ward.Nacosta@epa.gov]; Lamberth, Larry [Lamberth.Larry@epa.gov]; Newman, Keriema [Newman.Keriema@epa.gov]  
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Allison

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Thanks so much,

Amber Spradley  
228-806-7325

Begin forwarded message:

**From:** Zahra Ahmad <[zahmad@earthjustice.org](mailto:zahmad@earthjustice.org)>  
**Date:** April 6, 2023 at 5:07:07 PM CDT  
**To:** Amber Spradley <[Amber.Spradley@wlox.com](mailto:Amber.Spradley@wlox.com)>  
**Subject:** Embargoed until 11 a.m. EST April 7, 2023

**EMBARGOED UNTIL 11 A.M. EST April 7, 2023**

**For Immediate Release** | April 7, 2023

Contact: Zahra Ahmad, [zahmad@earthjustice.org](mailto:zahmad@earthjustice.org), (517)898-0924

## **Community Sues EPA for Allowing Production of Petrochemical Fuel Despite Extreme Cancer Risk**

*EPA approved Chevron USA's request to make the fuel despite the up to 1 in 4 cancer risk it poses to a fenceline community in Pascagoula, Mississippi*

**Washington, D.C.**— A community group in Pascagoula, Mississippi, today filed a lawsuit against the Environmental Protection Agency for its approval of new chemicals to make fuels despite finding that the resulting air pollution would pose a cancer risk 250,000 times greater than what the agency typically considers unreasonable.

Cherokee Concerned Citizens is challenging EPA's decision to allow the world's largest Chevron refinery—located about a mile away from their neighborhood—to turn plastic waste into fuels. EPA determined that production of Chevron's new chemicals will pose up to a 1 in 4 cancer risk, meaning 25% of residents living nearby could develop cancer over their lifetime.

Under the Toxic Substances Control Act, EPA can't approve new chemicals with serious health or environmental risks without identifying and implementing ways to minimize the dangers. The agency can also order lab testing that would clarify such risks. EPA did not do either before approving Chevron's request to produce this hazardous fuel.

"EPA's decision to let Chevron poison the community in Pascagoula with chemicals posing astronomical cancer risks makes a mockery of the agency's stated commitments to environmental justice," said Earthjustice attorney Katherine O'Brien. "EPA needs to follow the law and protect people at the fenceline, not greenwash for Chevron by passing off the company's plastic-waste fuel as a solution to the climate crisis."

The Cherokee Concerned Citizens represent a fenceline community overburdened by pollution from several facilities including the Chevron refinery, which is visible from their neighborhood, a BP gas processing plant, the Mississippi Phosphates superfund site, and more. A total of 70 toxic chemical releases, from benzene to formaldehyde, have been reported to regulatory agencies by the facilities in Pascagoula.

"We can't tolerate it anymore," said **Barbara Weckesser, co-founder of Cherokee Concerned Citizens**. "It's always been profit over the people, but it must end now. The residents in our community are already at a higher risk of developing health problems because of all the industry polluting our neighborhood. The EPA's approval of Chevron's ask is forcing us to fight, leave, or stay here and die."

EPA approved Chevron's creation of fuel products from discarded plastics under a program that it says will help "confront the climate crisis" by promoting the development of new biofuels to replace petroleum-based fuels. But fuel made from plastic waste is not biofuel; it's part of the oil and gas industry's last-ditch effort to protect their profits by betting big on petrochemicals, which are converted components of oil and gas used to make plastic building blocks.

In the U.S., the industry is planning a massive build-out of petrochemical plants. Many of these facilities are planned in low-income communities and communities of color already overburdened by pollution and a long history of environmental racism. If the build-out goes forward, it will lock in more climate pollution, plastic waste, and toxic chemicals that poison communities.

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**CC:** Wise, Allison [Wise.Allison@epa.gov]  
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Including ARD as this is related to the pyrolysis process.

**César A. Zapata**, Director  
Land, Chemicals and Redevelopment Division  
United States Environmental Protection Agency, Region 4

***Our Vision:** Protecting human health and the environment through responsible waste management, effective chemical safety, and collaborative redevelopment of contaminated land.*

***Our Guiding Values:** Customer Service, Innovation, Integrity, National Leadership, Ownership, and Partnerships.*

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**To:** Amber Spradley <[Amber.Spradley@wlox.com](mailto:Amber.Spradley@wlox.com)>

**Subject:** Embargoed until 11 a.m. EST April 7, 2023

**EMBARGOED UNTIL 11 A.M. EST April 7, 2023**

**For Immediate Release** | April 7, 2023

Contact: Zahra Ahmad, [zahmad@earthjustice.org](mailto:zahmad@earthjustice.org), (517)898-0924

## **Community Sues EPA for Allowing Production of Petrochemical Fuel Despite Extreme Cancer Risk**

*EPA approved Chevron USA's request to make the fuel despite the up to 1 in 4 cancer risk it poses to a fenceline community in Pascagoula, Mississippi*

**Washington, D.C.**— A community group in Pascagoula, Mississippi, today filed a lawsuit against the Environmental Protection Agency for its approval of new chemicals to make fuels despite finding that the resulting air pollution would pose a cancer risk 250,000 times greater than what the agency typically considers unreasonable.

Cherokee Concerned Citizens is challenging EPA's decision to allow the world's largest Chevron refinery—located about a mile away from their neighborhood—to turn plastic waste into fuels. EPA

determined that production of Chevron's new chemicals will pose up to a 1 in 4 cancer risk, meaning 25% of residents living nearby could develop cancer over their lifetime.

Under the Toxic Substances Control Act, EPA can't approve new chemicals with serious health or environmental risks without identifying and implementing ways to minimize the dangers. The agency can also order lab testing that would clarify such risks. EPA did not do either before approving Chevron's request to produce this hazardous fuel.

"EPA's decision to let Chevron poison the community in Pascagoula with chemicals posing astronomical cancer risks makes a mockery of the agency's stated commitments to environmental justice," said Earthjustice attorney Katherine O'Brien. "EPA needs to follow the law and protect people at the fenceline, not greenwash for Chevron by passing off the company's plastic-waste fuel as a solution to the climate crisis."

The Cherokee Concerned Citizens represent a fenceline community overburdened by pollution from several facilities including the Chevron refinery, which is visible from their neighborhood, a BP gas processing plant, the Mississippi Phosphates superfund site, and more. A total of 70 toxic chemical releases, from benzene to formaldehyde, have been reported to regulatory agencies by the facilities in Pascagoula.

"We can't tolerate it anymore," said **Barbara Weckesser, co-founder of Cherokee Concerned Citizens**. "It's always been profit over the people, but it must end now. The residents in our community are already at a higher risk of developing health problems because of all the industry polluting our neighborhood. The EPA's approval of Chevron's ask is forcing us to fight, leave, or stay here and die."

EPA approved Chevron's creation of fuel products from discarded plastics under a program that it says will help "confront the climate crisis" by promoting the development of new biofuels to replace petroleum-based fuels. But fuel made from plastic waste is not biofuel; it's part of the oil and gas industry's last-ditch effort to protect their profits by betting big on petrochemicals, which are converted components of oil and gas used to make plastic building blocks.

In the U.S., the industry is planning a massive build-out of petrochemical plants. Many of these facilities are planned in low-income communities and communities of color already overburdened by pollution and a long history of environmental racism. If the build-out goes forward, it will lock in more climate pollution, plastic waste, and toxic chemicals that poison communities.

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Message

---

**From:** Lamberth, Larry [Lamberth.Larry@epa.gov]  
**Sent:** 2/13/2023 5:47:30 PM  
**To:** Keefer, David [Keefer.David@epa.gov]; Wise, Allison [Wise.Allison@epa.gov]; Marraccini, Davina [Marraccini.Davina@epa.gov]  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Who's running point for you all ?

Thanks.

Larry

Larry L. Lamberth  
Deputy Director  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency  
14<sup>th</sup> Floor Sam Nunn Federal Center  
61 Forsyth Street  
Atlanta, Georgia 30303

Telephone: 404-562-8590

Cell: 404-769-5583

Fax: 404-562-8566

---

**From:** Kemker, Carol <Kemker.Carol@epa.gov>  
**Sent:** Monday, February 13, 2023 12:13 PM  
**To:** Lamberth, Larry <Lamberth.Larry@epa.gov>  
**Subject:** FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Can you coordinate with SEMD on how to respond (or not) to this request?

---




**From:** Dominique Burkhardt <[dburkhardt@earthjustice.org](mailto:dburkhardt@earthjustice.org)>  
**Sent:** Monday, February 13, 2023 12:07 PM  
**To:** Geis, Stacey <[Geis.Stacey@epa.gov](mailto:Geis.Stacey@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>; Oquendo, Ana (she/her/hers) <[Oquendo.Ana@epa.gov](mailto:Oquendo.Ana@epa.gov)>; Freeman, Caroline <[Freeman.Caroline@epa.gov](mailto:Freeman.Caroline@epa.gov)>; Kemker, Carol <[Kemker.Carol@epa.gov](mailto:Kemker.Carol@epa.gov)>; Hoang, Anhthu <[Hoang.Anhthu@epa.gov](mailto:Hoang.Anhthu@epa.gov)>; Vong, Suong <[Vong.Suong@epa.gov](mailto:Vong.Suong@epa.gov)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Lassiter, Penny <[Lassiter.Penny@epa.gov](mailto:Lassiter.Penny@epa.gov)>  
**Cc:** [gina@floridarising.org](mailto:gina@floridarising.org); Kelli Thomas <[kelli@floridarising.org](mailto:kelli@floridarising.org)>; MacKenzie Marcelin <[mackenzie@floridarising.org](mailto:mackenzie@floridarising.org)>; [sebastian@floridarising.org](mailto:sebastian@floridarising.org); Nestor Perez <[nperez@earthjustice.org](mailto:nperez@earthjustice.org)>; Bradley Marshall <[bmarshall@earthjustice.org](mailto:bmarshall@earthjustice.org)>; [jjsmith@earthjustice.org](mailto:jjsmith@earthjustice.org)  
**Subject:** Urgent Response Needed Re. Fire at EPA-Regulated Incinerator  
**Importance:** High

Good Afternoon,

We are writing to bring to your attention a massive fire that broke out yesterday at a municipal waste incinerator in a residential community in Doral, FL: the Miami-Dade County Resources Recovery Facility (address: 6990 NW 97th Avenue, Doral, FL 33178).

EPA maintains oversight of this facility under the Clean Air Act. The fire began around 2 p.m. yesterday, and though it has been contained somewhat, **it is ongoing, and it is expected that it will take days for firefighters to out the fire.** The apparent cause is that waste on a conveyor belt caught on fire.

Here is news coverage of the incident.

- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272447693.html>
- <https://www.miamiherald.com/news/local/community/miami-dade/doral/article272457138.html>
- <https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/>
- <https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/>
-  [processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4](#)
-  [processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4](#)
-  [original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4](#)

As you may be aware, Florida Rising has been opposed to this polluting waste incinerator in a residential community, calling for denial of the Title V air permit renewal via written comments and filing a civil rights complaint to EPA's Office of Civil Rights.

Now, community members in this environmental justice community face even more toxic exposure to air pollution from the billowing smoke from this fire, as they are forced to remain indoors and essentially protect themselves from this hazard. As part of its waste burning, this incinerator normally burns plastic and tires, and it is not prohibited from burning medical waste; as a result, the community is naturally fearful of what toxins they are now being exposed to from this fire.

**We are calling on EPA to act under its enforcement authority and its mandate to protect human health from these types of toxic exposures to:**

- 1) **Assist with immediately safeguarding the health of residents near this fire**, including evacuations and the shutting down of schools;
- 2) **Conduct a prompt, full, and independent investigation** into the cause of this fire, making the investigation results available to the public; and
- 3) **Order the facility operator, Covanta Energy, to cease operations at this source** indefinitely, and at least until the conclusion of an independent investigation and the determination by EPA that it is safe to resume operations at this facility.

Waste incinerators emit a host of toxic pollution that is harmful to people's health, and in Doral, in Florida, and in the United States, these facilities are predominantly in Black and brown communities. We are calling on EPA to act now, while also facilitating the shutdown of these harmful facilities in favor of safer, and more sustainable waste management alternatives, such as the ones outlined in your agency's Zero Waste Toolkit.

Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt  
Senior Attorney  
Florida Regional Office

4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5435  
[www.earthjustice.org](http://www.earthjustice.org)



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Message

---

**From:** Hansen, Susan [Hansen.Susan@epa.gov]  
**Sent:** 4/7/2023 5:17:05 PM  
**To:** Kemker, Carol [Kemker.Carol@epa.gov]; Zapata, Cesar [Zapata.Cesar@epa.gov]; Pinkney, James [Pinkney.James@epa.gov]; Ward, Nacosta [Ward.Nacosta@epa.gov]; Lamberth, Larry [Lamberth.Larry@epa.gov]; Newman, Keriema [Newman.Keriema@epa.gov]; Freeman, Caroline [Freeman.Caroline@epa.gov]; Toney, Anthony [Toney.Anthony@epa.gov]  
**CC:** Wise, Allison [Wise.Allison@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Rubini, Suzanne [Rubini.Suzanne@epa.gov]  
**Subject:** RE: WLOX: Media Request  
**Attachments:** 2023.04.06 Pet. for Review.pdf

We were able to find the complaint - - it was filed in the DC Circuit and is a challenge against a TSCA 5(e) Order that was issued by Headquarters.

[https://www.documentcloud.org/documents/23607053-sl-sanitized\\_consent\\_order\\_p\\_21\\_0144c](https://www.documentcloud.org/documents/23607053-sl-sanitized_consent_order_p_21_0144c)

James - - we should refer any inquiries up to HQ external affairs office for response.

---

**From:** Kemker, Carol <Kemker.Carol@epa.gov>  
**Sent:** Friday, April 7, 2023 10:29 AM  
**To:** Zapata, Cesar <Zapata.Cesar@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>; Ward, Nacosta <Ward.Nacosta@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Toney, Anthony <Toney.Anthony@epa.gov>; Hansen, Susan <Hansen.Susan@epa.gov>  
**Cc:** Wise, Allison <Wise.Allison@epa.gov>  
**Subject:** RE: WLOX: Media Request

Adding Susan Hansen since this sounds like EPA has been sued.

---

**From:** Zapata, Cesar <Zapata.Cesar@epa.gov>  
**Sent:** Friday, April 7, 2023 10:28 AM  
**To:** Kemker, Carol <Kemker.Carol@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>; Ward, Nacosta <Ward.Nacosta@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Toney, Anthony <Toney.Anthony@epa.gov>  
**Cc:** Wise, Allison <Wise.Allison@epa.gov>  
**Subject:** RE: WLOX: Media Request

Including ARD as this is related to the pyrolysis process.

**César A. Zapata**, Director  
Land, Chemicals and Redevelopment Division  
United States Environmental Protection Agency, Region 4

***Our Vision:*** Protecting human health and the environment through responsible waste management, effective chemical safety, and collaborative redevelopment of contaminated land.

***Our Guiding Values:*** Customer Service, Innovation, Integrity, National Leadership, Ownership, and Partnerships.

---

**From:** Kemker, Carol <Kemker.Carol@epa.gov>  
**Sent:** Friday, April 7, 2023 10:23 AM  
**To:** Pinkney, James <Pinkney.James@epa.gov>; Ward, Nacosta <Ward.Nacosta@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>  
**Cc:** Wise, Allison <Wise.Allison@epa.gov>; Zapata, Cesar <Zapata.Cesar@epa.gov>  
**Subject:** RE: WLOX: Media Request

I am looking into this and will get back to you. It sounds like it could be a permitting issue. Give me a bit to figure it out. I'm copying Cesar to see if he knows.

---

**From:** Pinkney, James <Pinkney.James@epa.gov>  
**Sent:** Friday, April 7, 2023 10:11 AM  
**To:** Ward, Nacosta <Ward.Nacosta@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>  
**Cc:** Kemker, Carol <Kemker.Carol@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>  
**Subject:** FW: WLOX: Media Request

Nacosta,

We received the following request for an interview this morning. Who should I work with in ECAD?

James

---

**From:** Wise, Allison <Wise.Allison@epa.gov>  
**Sent:** Friday, April 7, 2023 9:00 AM  
**To:** EPA Press Office <Press@epa.gov>; Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Milbourn, Cathy <Milbourn.Cathy@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>  
**Subject:** RE: WLOX: Media Request

Adding James

Allison

---

**From:** Amber Spradley <Amber.Spradley@wlox.com>  
**Sent:** Friday, April 7, 2023 8:03 AM  
**To:** EPA Press Office <Press@epa.gov>; Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>; Milbourn, Cathy <Milbourn.Cathy@epa.gov>  
**Subject:** WLOX: Media Request

Hello there,

My name is Amber Spradley. I am a reporter with WLOX in South Mississippi.

I am covering a community group in Pascagoula suing EPA for allowing pyrolysis oil at Chevron, the "Cherokee Concerned Citizens".

I am forwarding a press release I received that is embargoed until 11ET/10CT AM.

Is someone from your team available to Zoom with me this morning or provide a statement in response to the filing and your thoughts on the concern over the health hazards involved, if any.

Thanks so much,

Amber Spradley  
228-806-7325

Begin forwarded message:

**From:** Zahra Ahmad <[zahmad@earthjustice.org](mailto:zahmad@earthjustice.org)>  
**Date:** April 6, 2023 at 5:07:07 PM CDT  
**To:** Amber Spradley <[Amber.Spradley@wlox.com](mailto:Amber.Spradley@wlox.com)>  
**Subject:** Embargoed until 11 a.m. EST April 7, 2023

**EMBARGOED UNTIL 11 A.M. EST April 7, 2023**

**For Immediate Release** | April 7, 2023  
Contact: Zahra Ahmad, [zahmad@earthjustice.org](mailto:zahmad@earthjustice.org), (517)898-0924

## **Community Sues EPA for Allowing Production of Petrochemical Fuel Despite Extreme Cancer Risk**

*EPA approved Chevron USA's request to make the fuel despite the up to 1 in 4 cancer risk it poses to a fenceline community in Pascagoula, Mississippi*

**Washington, D.C.**— A community group in Pascagoula, Mississippi, today filed a lawsuit against the Environmental Protection Agency for its approval of new chemicals to make fuels despite finding that the resulting air pollution would pose a cancer risk 250,000 times greater than what the agency typically considers unreasonable.

Cherokee Concerned Citizens is challenging EPA's decision to allow the world's largest Chevron refinery—located about a mile away from their neighborhood—to turn plastic waste into fuels. EPA determined that production of Chevron's new chemicals will pose up to a 1 in 4 cancer risk, meaning 25% of residents living nearby could develop cancer over their lifetime.

Under the Toxic Substances Control Act, EPA can't approve new chemicals with serious health or environmental risks without identifying and implementing ways to minimize the dangers. The agency can also order lab testing that would clarify such risks. EPA did not do either before approving Chevron's request to produce this hazardous fuel.

"EPA's decision to let Chevron poison the community in Pascagoula with chemicals posing astronomical cancer risks makes a mockery of the agency's stated commitments to environmental justice," said Earthjustice attorney Katherine O'Brien. "EPA needs to follow the law and protect people at the fenceline, not greenwash for Chevron by passing off the company's plastic-waste fuel as a solution to the climate crisis."

The Cherokee Concerned Citizens represent a fenceline community overburdened by pollution from several facilities including the Chevron refinery, which is visible from their neighborhood, a BP gas processing plant, the Mississippi Phosphates superfund site, and more. A total of 70 toxic chemical releases, from benzene to formaldehyde, have been reported to regulatory agencies by the facilities in Pascagoula.

"We can't tolerate it anymore," said **Barbara Weckesser, co-founder of Cherokee Concerned Citizens**. "It's always been profit over the people, but it must end now. The residents in our community are

already at a higher risk of developing health problems because of all the industry polluting our neighborhood. The EPA's approval of Chevron's ask is forcing us to fight, leave, or stay here and die."

EPA approved Chevron's creation of fuel products from discarded plastics under a program that it says will help "confront the climate crisis" by promoting the development of new biofuels to replace petroleum-based fuels. But fuel made from plastic waste is not biofuel; it's part of the oil and gas industry's last-ditch effort to protect their profits by betting big on petrochemicals, which are converted components of oil and gas used to make plastic building blocks.

In the U.S., the industry is planning a massive build-out of petrochemical plants. Many of these facilities are planned in low-income communities and communities of color already overburdened by pollution and a long history of environmental racism. If the build-out goes forward, it will lock in more climate pollution, plastic waste, and toxic chemicals that poison communities.

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CHEROKEE CONCERNED CITIZENS,

*Petitioner,*

v.

No. \_\_\_\_\_

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY and MICHAEL  
REGAN, Administrator, United States  
Environmental Protection Agency,

*Respondents.*

**PETITION FOR REVIEW**

Pursuant to the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2618, Rule 15 of the Federal Rules of Appellate Procedure, and D.C. Circuit Rule 15, Cherokee Concerned Citizens (“Petitioner”) hereby petitions this Court for review of the attached TSCA Section 5 Order for a New Chemical Substance, signed by Respondent U.S. Environmental Protection Agency on August 11, 2022, authorizing Chevron U.S.A. Inc. to manufacture, process, distribute in commerce, use, or dispose of certain new chemical substances enumerated therein.

DATED: April 7, 2023

Respectfully submitted,

/s/Katherine K. O'Brien  
KATHERINE K. O'BRIEN  
Earthjustice  
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(212) 284-8036  
kobrien@earthjustice.org

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JONATHAN KALMUSS-KATZ  
Earthjustice  
48 Wall St., 19th Floor  
New York, NY 10005  
(212) 823-4989  
jkalmusskatz@earthjustice.org

*Counsel for Petitioner*

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CHEROKEE CONCERNED CITIZENS,

*Petitioner,*

v.

No. \_\_\_\_\_

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY and MICHAEL  
REGAN, Administrator, United States  
Environmental Protection Agency,

*Respondents.*

**RULE 26.1 DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Petitioner Cherokee Concerned Citizens states that it is a nonprofit corporation based in Pascagoula, MS, that is dedicated to protecting the health and well-being of residents in Pascagoula's Cherokee Forest neighborhood from exposure to industrial pollution. Cherokee Concerned Citizens has no parent corporation and no publicly held corporation owns 10% or more of its stock.

DATED: April 7, 2023

Respectfully submitted,

/s/Katherine K. O'Brien  
KATHERINE K. O'BRIEN  
Earthjustice  
P.O. Box 2297  
South Portland, ME 04116  
(212) 284-8036  
kobrien@earthjustice.org

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48 Wall St., 19th Floor  
New York, NY 10005  
(212) 823-4989  
jkalmusskatz@earthjustice.org

*Counsel for Petitioner*

## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing and attached documents on this date with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit using the Appellate Electronic Filing system.

I further certify that I served the foregoing and attached documents via certified mail on:

Randy Hill  
Associate General Counsel  
Pesticides and Toxic Substances Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
USEPA Headquarters  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue, N.W.  
Mail Code: 2333A  
Washington, D.C. 20460

Correspondence Control Unit  
Office of General Counsel (2311)  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Merrick Garland  
Attorney General of the United States  
950 Pennsylvania Ave., NW  
Washington, D.C. 20530-0001

Chevron USA, Inc.  
c/o Prentice-Hall Corporation Inc.  
1090 Vermont Ave, NW  
Washington, D.C. 20005

DATED: April 7, 2023

/s/Katherine K. O'Brien  
KATHERINE K. O'BRIEN  
Earthjustice  
P.O. Box 2297  
South Portland, ME 04116  
(212) 284-8036  
kobrien@earthjustice.org

EPA Sanitized  
United States Environmental Protection Agency  
Office of Pollution Prevention and Toxics  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

**TSCA SECTION 5 ORDER FOR A NEW CHEMICAL SUBSTANCE**

Premanufacture Notice (PMN) Numbers: Received 08/25/2022  
P-21-0144-0147, P-21-0148-0150, P-21-0152-0154, P-21-155-0158 and P-21-0160-0163  
Submission Dates: 06/07/2021, 06/07/2021, 06/14/2021, 06/08/2021, and 06/14/2021

In accordance with the provisions of Section 5(e) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2604(e),

Chevron U.S.A. Inc.

is authorized to manufacture, process, distribute in commerce, use, or dispose of these New Chemical Substances in the United States only in accordance with the requirements and conditions described in this Order.

**MADISON LE**

Digitally signed by MADISON LE  
DN: c=US, o=U.S. Government,  
ou=Environmental Protection Agency,  
cn=MADISON LE,  
0.9.2342.19200306.100.1.1=680010096425  
09  
Date: 2022.08.11 17:38:09 -04'00'

Madison H. Le, Director  
New Chemicals Division  
Office of Pollution Prevention and Toxics  
U.S. Environmental Protection Agency

Date

Name

Kristi Mitchum  
HSE Manager, Pascagoula Refinery  
Chevron USA Inc.

Title

Company

8/25/2022

Date

This document contains CBI

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## Jurisdiction and General Provisions

This Order is issued by the United States Environmental Protection Agency ("EPA" or "the Agency") pursuant to Section 5(e) of the Toxic Substances Control Act ("TSCA"), as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, 15 U.S.C. § 2604(e), regarding premanufacture notices (PMNs) P-21-0144-0147, P-21-0148-0150, P-21-0152-0154, P-21-155-0158 and P-21-0160-0163 submitted by Chevron U.S.A. Inc. (the Company) for

[REDACTED]

[REDACTED] (New Chemical Substances). This Order is issued and entered into under the authority vested in the Administrator of the EPA by Section 5(e)(1) of TSCA, 15 U.S.C. § 2604(e)(1). Based upon EPA's assessment of these New Chemical Substances, the administrative record, and determinations made herein, the Company may manufacture, process, distribute in

commerce, use, or dispose of these New Chemical Substances in the United States only in accordance with the requirements and conditions described in this Order.

The Company must comply with all provisions of this Order, including but not limited to, all appendices to this Order and all documents incorporated by reference. According to Section 15 of TSCA, 15 U.S.C. § 2614, it is unlawful to fail or refuse to comply with any order issued under Section 5(e) of TSCA, 15 U.S.C. § 2604(e). Any person who violates the terms of this Order may be subject to both criminal and civil liabilities pursuant to Section 16 of TSCA, 15 U.S.C. § 2615, and to specific enforcement and seizures pursuant to Section 17 of TSCA, 15 U.S.C. § 2616. Falsifying information provided to EPA or concealing information from EPA is a violation of this Order and is subject to penalties pursuant to 18 U.S.C. § 1001.

This Order encompasses the entire agreement between the EPA and the Company with regard to these New Chemical Substances and supersedes any previous agreements between the parties whether oral or written.

The Company waives any rights to challenge the basis or validity of this Order or its terms, including both substantive and procedural requirements, such as whether the order was issued 45 days before the end of the PMN Review Period as provided in TSCA § 5(e)(1)(B), 15 U.S.C. § 2604(e)(1)(B).

The Company has reviewed this Order carefully and agrees that all information that is claimed as confidential is correctly identified within brackets and that the Company has previously submitted that information to EPA under a claim of confidentiality in accordance with the requirements of TSCA and applicable regulations. Any information that is not bracketed is not claimed as confidential and/or any previous confidentiality claim is withdrawn.

Nothing in this Order substitutes for or supersedes any statutory and regulatory requirements under TSCA or any other statute. Section 8(e) of TSCA, 15 U.S.C. § 2607(e) requires the Company to immediately notify EPA if it obtains any information which reasonably supports the conclusion that these New Chemical Substances present a substantial risk of injury to health or the environment. The notice must reference the appropriate PMN identification numbers for

these substances and contain a statement that these New Chemical Substances are subject to this Order.

The terms and conditions not otherwise defined in this Order have the meanings assigned to them in TSCA or in regulations promulgated under TSCA. Appendix 1 Definitions shall apply to this Order and its appendices.

## EPA's Determination under Section 5(a)(3)(B)

The following determination constitutes the basis of this Order issued under Section 5(e) of TSCA, 15 U.S.C. § 2604(e):

EPA has determined, pursuant to Sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I) of TSCA, 15 U.S.C. §§ 2604(a)(3)(B)(ii)(I) and (e)(1)(A)(ii)(I), that, in the absence of sufficient information to permit the Agency to make a reasoned evaluation of the health and environmental effects of these New Chemical Substances, the manufacture, processing, distribution in commerce, use, or disposal of these New Chemical Substances may present an unreasonable risk of injury to health or the environment.

The basis for EPA's determination is attached as Appendix 2 to this Order.

## Requirements

The Order applies to all commercial manufacturing, processing, distribution in commerce, processing, use and disposal of these New Chemical Substances, P-21-0144-0147, P-21-0148-0150, P-21-0152-0154, P-21-155-0158 and P-21-0160-0163 for [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] by the Company, as follows:

I. Terms of Manufacturing

A. Conditions of Manufacturing for the Company

The Company must refrain from manufacturing these New Chemical Substances other than for use as a fuel, fuel additive, fuel blending stock, or refinery feedstock (including, but not limited to: cracking, coking, hydroprocessing, distillation, or deasphalting) subject to 40 C.F.R. Part 79 or 1090. When used as a fuel these New Chemical Substances are regulated under applicable EPA regulations for fuels, fuel additives, and regulated blendstocks (40 CFR Part 1090), registration of fuels and fuel additives (40 CFR Part 79), and other applicable EPA and OSHA regulations for worker safety, handling, storage, and transport that are intended to mitigate risks from exposure to fuels as listed in Attachment A. (The attachment is not intended to be an exhaustive list of environmental, health, and safety regulations. There may be other federal, state, and/or local regulations that apply to fuel quality, transportation, handling, dispensing and storage.)

B. Limit on Manufacture by Others

1. The Company must not cause, encourage, or suggest the manufacture of these New Chemical Substances within the United States by any other person.
2. Termination of Certain Obligations Through Significant New Use Rule (SNUR) and Final SNUR Required Notification
  - a. The prohibition in the above Paragraph 1 expires according to the provisions in Appendix 3.
  - b. Once the prohibition in the above Paragraph 1 expires, whenever the Company causes, encourages, or suggests that a person manufacture

these New Chemical Substances, the Company must notify that person once in writing of the existence of the final SNUR, according to the conditions outlined in applicable portions of Appendix 3, and maintain a copy of such notification for 5 years.

## II. Terms of Processing and Use

The Company must refrain from processing and using these New Chemical Substances other than as a fuel, fuel additive, fuel blending stock, or refinery feedstock (including, but not limited to: cracking, coking, hydroprocessing, distillation, or deasphalting) subject to 40 C.F.R. Part 79 or 1090. When used as a fuel these New Chemical Substances are regulated under applicable EPA regulations for fuels, fuel additives, and regulated blendstocks (40 CFR Part 1090), registration of fuels and fuel additives (40 CFR Part 79), and other applicable EPA and OSHA regulations for worker safety, handling, storage, and transport that are intended to mitigate risks from exposure to fuels as listed in Attachment A. (The attachment is not intended to be an exhaustive list of environmental, health, and safety regulations. There may be other federal, state, and/or local regulations that apply to fuel quality, transportation, handling, dispensing and storage.)

## III. Terms of Distribution

The Company may distribute these New Chemical Substances to another person only under the following conditions:

### A. Export Notification

The Company must notify, in writing, any person to whom it distributes these New Chemical Substances that these New Chemical Substances are subject to the notification requirements of TSCA Section 12(b), 5 U.S.C. § 2611(b), and 40 C.F.R. part 707, subpart D.

### B. Written Agreement

Prior to distributing these New Chemical Substances to any person the Company must obtain from that person a written agreement that the person will:

1. Comply with the following terms and restrictions of this Order:
  - a Protection in the Workplace (Section V and Appendix 4),
  - b Terms of Processing and Use (Section II)
2. Not further distribute these New Chemical Substances to any other person except (i) for the purposes of disposal, (ii) according to the terms and conditions for temporary transport and storage, or (iii) unless they have been incorporated into a fuel, fuel additive, fuel blending stock, or used as a refinery feedstock (including, but not limited to: cracking, coking, hydroprocessing, distillation, or deasphalting).

C. Containers

1. Containers containing these New Chemical Substances must be labeled according to the applicable requirements in the Occupational Safety and Health Administration (OSHA)'s Hazard Communication Standard set forth at 29 C.F.R. § 1910.1200.
2. Containers containing these New Chemical Substances are subject to requirements of the Department of Transportation (DOT) and EPA as listed in Attachment A.

D. Recipient Non-Compliance

If the Company obtains knowledge that a recipient of these New Chemical Substances has failed to comply with any of the required Terms of an agreement required by Section III.B, entered into with the recipient ("Recipient"), the Company must immediately cease to supply the substance to that Recipient, unless the Company is able to document all of the following:

1. The Company, within 5 working days of obtaining knowledge of non-compliance, notified the Recipient in writing that the Recipient has failed to comply with any of the Terms of Distribution, or has engaged in a significant new use without submitting a significant new use notice (SNUN) to the EPA.

2. The Company, within 15 working days of notifying the Recipient of the noncompliance, received a written statement of assurance that the Recipient is aware of the Terms of Distribution and will comply with those terms or is aware of the terms of the SNUR and will not engage in a significant new use without submitting a SNUN to EPA.
3. The Company, after obtaining knowledge that the Recipient has failed to comply with any Terms of Distribution requirements or has engaged in a significant new use without submitting a SNUN after receiving a written statement of assurance from the Recipient, immediately ceased to supply these New Chemical Substances to the Recipient and notified EPA.
4. The Company received written notification from EPA that permits its distribution of these New Chemical Substances to the Recipient.

E. Termination of Certain Obligations Through Significant New Use Rule (SNUR) and Final SNUR Required Notification

- a. The requirements of paragraphs B, C, and D of this Terms of Distribution Section and the Temporary Storage and Transport Section will terminate in accordance with the conditions of the Appendix titled Termination of Certain Obligations through Significant New Use Rule (SNUR) and SNUR Notification Requirements.
- b. Whenever the Company distributes the New Chemical Substance to another person, the Company must notify that person in writing of the existence of the final SNUR, according to the conditions outlined in the Appendix titled Termination of Certain Obligations through Significant New Use Rule (SNUR) and SNUR Notification Requirements and maintain a copy of such notification for 5 years.

IV. Temporary Transport and Storage

The Company's transport of these New Chemical Substances for temporary storage must be pursuant to the following limitations:

- A. Containers containing these New Chemical Substances are subject to requirements of the Department of Transportation (DOT) and EPA as listed in Attachment A.
- B. Containers must be labeled according to the requirements in the OSHA Hazard Communication Standard set forth at 29 C.F.R. § 1910.1200 and should not conflict with the requirements of the Hazardous Materials Transportation Act (49 U.S.C. § 5101 *et seq.*) and its implementing regulations issued by the Department of Transportation.

V. Protection in the Workplace

The Company must establish and implement a program to prevent workplace exposure pursuant to the Protection in the Workplace requirements in Appendix 4 prior to manufacturing, processing, using and/or distributing these New Chemical Substances.

VI. Hazard Communication Program

The Company must establish and implement a hazard communication program consistent with the requirements in 29 C.F.R § 1910.1200 prior to manufacturing, processing, using and/or distributing these New Chemical Substances.

VII. Risk Notification

If EPA finds or determines, that despite the Company's compliance with the terms of this Order, these New Chemical Substances may be contributing to an unreasonable risk or may present an unreasonable risk, or an additional unreasonable risk to human health or the environment:

- A. EPA will notify the Company, in writing, of its determination.
- B. The Company must cease all manufacturing, processing, distribution, use and disposal of these New Chemical Substances, unless:

1. The Company complies with the specific actions concerning testing, hazard communication and/or limits on manufacturing, processing, distribution, use or disposal of these New Chemical Substances, and
2. The Company incorporates any new risk information and information on methods for protecting against such risk, on the label and into the Safety Data Sheet (SDS), within 90 days and provide the updated SDS to all persons who receive or have received these New Chemical Substances within the last 5 years.

The Company may submit a written report, within 30 days of receipt of EPA's risk notification, refuting EPA's determination and/or the appropriateness of any additional requirements imposed by EPA.

- A. The Company's report must be submitted as a support document for these PMNs according to the procedures set out in 40 C.F.R. § 720.40.
- B. EPA will respond promptly to the Company's report, in writing.
- C. The Company, upon receipt of EPA's response, must comply with any requirements imposed by EPA's response prior to restarting any manufacturing, processing, distribution, use and disposal of these New Chemical Substances.

#### VIII. Recordkeeping

The Company must maintain records pursuant to the recordkeeping requirements outlined in Appendix 5 for 5 years (or longer if specified in this Order) after their creation date.

#### IX. Automatic Sunset of Test Market Exemption ("TME"), Low Volume Exemption ("LVE"), and Low Release and Exposure Exemption ("LoREX")

The Company is prohibited from the manufacture, processing, distribution in commerce, use, or disposal of these New Chemical Substances pursuant to a TME under 40 C.F.R. § 720.38, or a LVE or LoREX under 40 C.F.R. § 723.50(c)(1) or (2), respectively, as of the effective date of this Order.

## X. Exemptions

The requirements of the Order apply to manufacture, processing, distribution in commerce, use and/or disposal of these New Chemical Substances by the Company at any site under the Company's control. The following exemptions do not apply to these New Chemical substances:

- A. solely for export at 40 C.F.R 720.30(e);
- B. impurity at 720.30(h)(1); and
- C. byproduct at 720.30(h)(2).

The requirements of the Order do not apply to manufacture, processing, distribution in commerce, use, and/or disposal of these New Chemical Substances by the Company at any site under the Company's control for the following:

- A. small quantities manufactured, processed, used or distributed in commerce solely for R&D in accordance with Section 5(h)(3) of TSCA, 15 U.S.C. § 2604(h)(3), as defined at 40 C.F.R. § 720.3(cc), and 40 C.F.R. § 720.36;
- B. when manufactured solely for non-commercial R&D in accordance with 40 C.F.R. § 720.30(i);
- C. when imported as part of an "article" as defined at 40 C.F.R. § 720.3(c) and in compliance with 40 C.F.R. § 720.22(b)(1); or,
- D. when incorporated into a fuel, fuel additive, fuel blending stock, or used as a refinery feedstock (including, but not limited to: cracking, coking, hydroprocessing, distillation, or deasphalting).

Regardless of whether the Company meets any exemption expressly permitted by this section, recordkeeping requirements found in Appendix 5 continue to apply.

## XI. Requests for Information

This Order does not affect EPA's ability to seek information regarding TSCA regulated chemicals, including these New Chemical Substances. In order to ensure

continuing compliance with the terms of this Order, EPA may issue a request for information to the Company at any time after the effective date of this Order. Failure to respond to such a request shall be a violation of this Order.

**XII. Successor Liability Upon Transfer of Order**

The Company may transfer its interest in these New Chemical Substances, including its ability to manufacture these New Chemical Substances conferred by this Order, to a Successor in Interest pursuant to the Successor Liability Upon Transfer of Order requirements in Appendix 6.

**XIII. Modification and Revocation of the Order**

The Company may request at any time, in writing and based upon new information, that EPA modify or revoke provisions of this Order.

EPA may modify or revoke provisions of this Order if EPA determines that specific requirements of this Order are no longer necessary to protect against a previously identified risk, or upon consideration of any information, new or existing, that these New Chemical Substances are not likely to present an unreasonable risk of injury to health or the environment.

EPA may, at any time, upon the receipt or evaluation of any information, new or existing, determine that these New Chemical Substances presents or may present an unreasonable risk of injury to health or the environment, and may issue a rule to regulate the substance or modify this Order to address any risks.

**XIV. Office of Management and Budget (OMB) Control Number**

Under the Paperwork Reduction Act and its regulations at 5 C.F.R. part 1320, the Company is not required to respond to this collection of information unless this Order displays a currently valid control number from OMB. The collection of information required in this Order has been approved under the currently valid OMB Control Number 2070-0012.

XV. Reservation of Rights

Except as specifically provided in this Order, nothing in this Order shall limit EPA's authority to take, direct, or order any action necessary to protect public health, welfare, or the environment. This Order does not prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring the Company in the future to perform additional activities pursuant to TSCA or any other applicable law.

EPA may use any information submitted under this Order in an administrative, civil judicial or criminal action.

XVI. Effective Date

This Order is effective upon expiration of the applicable review period.

XVII. Potentially Useful Information

"Potentially Useful Information" (Table 1, definition in Appendix 1) would assist in evaluating the potential effects caused by these New Chemical Substances.

Information	Effects
Skin irritation	Human Health
Eye irritation	Human Health
Respiratory depression/irritation	Human Health
Hydrocarbon pneumonia/aspiration hazard	Human Health
Reproductive developmental toxicity	Human Health
Systemic toxicity	Human Health
Genetic toxicity	Human Health
Carcinogenicity	Human Health
Aquatic Toxicity	Ecotoxicity
Consumer inhalation exposures at gas station	Human Health

The Company is not required to submit the "Potentially Useful Information."

NOTE: Any required testing and/or potentially useful information described in this Consent Order was based on EPA's consideration of available screening-level data, if

any, as well as other available information on appropriate testing for the PMN substance. Further, any such testing/information identified by EPA that includes testing on vertebrates reflects the consideration of available toxicity information, computational toxicology and bioinformatics, and high-throughput screening methods and their prediction models. Pursuant to TSCA section 4(h), which pertains to reduction of testing in vertebrate animals, EPA encourages consultation with the Agency on the use of alternative test methods and strategies (also called New Approach Methodologies, or NAMs), if available, to generate the potentially useful information.

## Appendix 1: Definitions

“Chemical protective clothing” means items of clothing that provide a barrier to prevent dermal contact with chemical substances of concern (e.g., clothing that covers the entire body, boots, coveralls, gloves, jackets, and pants).

“Commercial” means the use of a chemical substance or a mixture containing the chemical substance in a commercial enterprise providing saleable goods or a service to consumers (e.g., a commercial dry-cleaning establishment or painting contractor).

“Consumer” means a private individual who uses a chemical substance or any product containing the chemical substance in or around a permanent or temporary household or residence, during recreation, or for any personal use or enjoyment.

“Consumer product” means a chemical substance that is directly, or as part of a mixture, sold or made available to consumers for their use in or around a permanent or temporary household or residence, in or around a school, or in recreation.

“Container” means any bag, barrel, bottle, box, can, cylinder, drum, reaction vessel, storage tank, or the like that contains the New Chemical Substance that is the subject of this Order. For purposes of this Order, pipes or piping systems, and engines, fuel tanks, or other operating systems in a vehicle, are not considered to be containers.

“Contract Manufacturer” means a person, outside the Company, who is authorized to manufacture the New Chemical Substance under the conditions specified in an Appendix to the Order.

“Enclosed Process” means a system of equipment directly connected to the production process that is designed, constructed, and operated in a manner which prevents emissions, or the release of any chemical substance into the facility or environment during the production process. Such emissions, including fugitive emissions, could lead to exposures to workers, the

public, or the environment. For an enclosed process, exposure and release could only occur due to loss of integrity or failure of the manufacturing process equipment or control systems.

“Equivocal data” means data which, although developed in apparent conformity with the Good Laboratory Practice Standards and EPA-reviewed protocols, are inconclusive, internally inconsistent, or otherwise insufficient to support a reasoned evaluation of the potential risk of injury to human health or the environment of the New Chemical Substance.

“Immediate use” means a use of a chemical substance that is under the control of, and used only by, a person who transferred it from a labeled container and will only be used by that person within the work shift in which it is transferred from the labeled container.

“Intermediate” means any chemical substance that is consumed, in whole or in part, in chemical reactions used for the intentional manufacture of another chemical substance(s) or mixture(s), or that is intentionally present for the purpose of altering the rates of such chemical reactions.

“Manufacture” means to produce or manufacture in the United States or import into the customs territory of the United States. This definition also applies to related noun and verb forms of “manufacture.”

“New Chemical Substance” means the chemical substance described in the premanufacture notice submitted by the Company relevant to this Order

“NIOSH” means the National Institute for Occupational Safety and Health of the U.S. Department of Health and Human Services.

“Open process” is any method of manufacture using equipment (such as a reactor, storage tank, or mixing vessel) causing the new chemical substance to be direct contact with the atmosphere.

“Personal protective equipment” means any protective clothing or device placed on the body to prevent contact with, and exposure to, an identified chemical substance or substances in the

work area. Examples include, but are not limited to, clothing, aprons, hoods, chemical goggles, face splash shields, or equivalent eye protection, and respirators. Barrier creams are not included in this definition.

“Potentially Useful Information” means data, or independent studies that may help EPA better characterize the potential risks associated with the restrictions on manufacturing, processing, use, distribution in commerce, and disposal detailed in this Consent Order. PUI can be submitted to EPA as part of a request to modify or rescind restrictions to this Order and can be submitted using alternative test methods and strategies to generate data to inform risk assessment. EPA encourages dialogue with Agency representatives to help determine how best the submitter can meet both the data needs and the objective of TSCA section 4(h).

“Results in inhalation exposure” means any manufacturing, processing, use or disposal activity/operation that generates a dust, mist, vapor or aerosol to which a worker is reasonably likely to be exposed.

“Scientifically invalid” means departing in any significant way from the EPA-reviewed protocol or the Good Laboratory Practice Standards at 40 C.F.R. part 792 such that the data do not support a reasoned evaluation of the health or environmental effects of the New Chemical Substance.

“SDS” means safety data sheet, the written listing of data for the chemical substance.

“Sealed” means a closed container that is physically and chemically suitable for long-term containment of the New Chemical Substance, and from which there will be no human exposure to, nor environmental release of, the New Chemical Substance during transport and storage.

“Site-limited intermediate” means an intermediate manufactured, processed, and used only within a site and not distributed in commerce other than as an impurity or for disposal. Imported intermediates cannot be “site-limited.”

“Successor in Interest” means a person outside the Company who has acquired the Company’s full interest in the rights to manufacture the New Chemical Substance, including all ownership

rights and legal liabilities, through a Transfer Document signed by the Company, as transferor, and the Successor in Interest, as transferee. The term excludes persons who acquire less than the full interest of the Company in the New Chemical Substance, such as a licensee who has acquired a limited license to the patent or manufacturing rights associated with the New Chemical Substance. A Successor in Interest must be incorporated, licensed, or doing business in the United States in accordance with 40 C.F.R. § 720.22(a)(3) and 40 C.F.R. § 720.3(z).

“Transfer Document” means the legal instrument(s) used to convey the interests in the New Chemical Substance, including the right to manufacture the New Chemical Substance, from the Company to the Successor in Interest.

“Work area” means a room or defined space in a workplace where the New Chemical Substance is manufactured, processed, or used and where employees are present.

“Workplace” means an establishment at one geographic location containing one or more work areas.

## Appendix 2: Basis for EPA's Determination

Chemical Name:

Specific:

[REDACTED]

Generic: Naphtha, heavy catalytic cracked (P-21-0144), Naphtha, heavy alkylate (P-21-0145), Naphtha, full range alkylate, butane-contg. (P-21-0146), Naphtha, hydrotreated heavy (P-21-0147), Naphtha, light catalytic cracked (P-21-148), Naphtha, light alkylate (P-21-0149), Naphtha, hydrotreated light (P-21-0150), Clarified oils, catalytic cracked P-21-0152), Distillates, hydroteated heavy (P-21-0153), Gas Oils hydrotreated vacuum (P-21-0154), Distillates, light catalytic cracked (P-21-0155), Distillates, clay-treated middle (P21-0156), Distillates, hydrotreated middle (P-21-157), Distillates, hydrotreated light P-21-0158), Gases, C4-rich (P-21-0160), Gases, catalytic cracking (P-21-0161), Residues, butane splitter bottoms P-21-0162), and Tail gas, saturate gas plant mixed stream, C4-rich (P-21-0163)

**Conditions of Use (intended, known, or reasonably foreseen)<sup>1</sup>:**

Intended conditions of use (specific): Manufacture and process for use as and use as a fuel, fuel additive, fuel blending stock, refinery feedstock (including, but not limited to: cracking, coking, hydroprocessing, distillation, or deasphalting) consistent with the manufacturing, processing, use, distribution, and disposal information described in these PMNs.

Known conditions of use: Applying such factors as described in footnote 1, EPA evaluated whether there are known conditions of use and found none.

Reasonably foreseen conditions of use: Applying such factors as described in footnote 1, EPA evaluated whether there are reasonably foreseen conditions of use and found the following: Use as a chemical intermediate, carrier for herbicides and pesticides, paint and ink formulations, indoor heating oil, and solvent blend for cleaning, feedstock for ethylene cracker and gasoline reformer, refinery feed to catalytic reformer and heavy naphtha sales, marine diesel fuels, anti-wear additive for greases, solvent/diluent for coatings, inks, adhesives, strippers and waxes, component of fuel oil, extraction solvent for metal recovery; cutting fluids; odorless mineral spirits, olefin manufacturing feedstock, specialty solvents, alcohol denaturant, and fuel blendstock based on analogues.

EPA has determined that in the absence of sufficient information to permit the Agency to make a reasoned evaluation of the health and environmental effects of the manufacture, processing, distribution in commerce, use, or disposal of these New Chemical Substances, for [REDACTED]

[REDACTED]

[REDACTED]

---

<sup>1</sup> Under TSCA § 3(4), the term “conditions of use” means “the circumstances, as determined by the Administrator, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of.” In general, EPA considers the intended conditions of use of a new chemical substance to be those identified in the section 5(a) notification. Known conditions of use include activities within the United States that result from manufacture that is exempt from PMN submission requirements. Reasonably foreseen conditions of use are future circumstances, distinct from known or intended conditions of use, under which the chemical substance may be manufactured, processed, distributed, used, or disposed of. EPA expects that the identification of “reasonably foreseen” conditions of use will be made on a fact-specific, case-by-case basis. EPA will apply its professional judgment and experience when considering factors such as evidence of current use of the new chemical substance outside the United States, information about known or intended uses of chemical substances that are structurally analogous to the new chemical substance, and conditions of use identified in an initial PMN submission that the submitter omits in a revised PMN. The sources EPA uses to identify reasonably foreseen conditions of use include searches of internal confidential EPA PMN databases (containing use information on analogue chemicals), other U.S. government public sources, the National Library of Medicine’s Hazardous Substances Data Bank (HSDB), the Chemical Abstract Service STN Platform, REACH Dossiers, technical encyclopedias (e.g., Kirk-Othmer and Ullmann), and Internet searches.

[REDACTED]

[REDACTED] may present an unreasonable risk of injury to health or the environment, without consideration of costs or other non-risk factors, (including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant by the Administrator) under the conditions of use, based on the risk assessment summarized below.

#### I. Health Effects Summary

Human health hazard is relevant to whether a New Chemical Substance is likely to present an unreasonable risk because the significance of the risk is dependent upon both the hazard (or toxicity) of the chemical substance and the extent of exposure to the substance.

EPA estimated the human health hazard of these chemical substances using a tiered approach for information that incorporated whole fuel-stream and hydrocarbon constituent data used as a fuel blend under the Toxic Substances Control Act (TSCA).

##### **Tier 1: Experimentally-derived information on these New Chemical Substances**

**Tier 2:** Experimentally-derived information on an analogous mixture

**Tier 3:** Experimentally-derived information on the most prevalent and/or most toxic constituents of these New Chemical Substance mixture

**Tier 4a:** Predicted (*in silico*) data on most prevalent constituents if no experimentally-derived data are available. Predictive tools (e.g., EPISuite) will be used to fill data gaps for physical-chemical and environmental fate properties and other tools (e.g., OECD QSAR Toolbox) will be used for human health hazard.

**Tier 4b:** Use of the most toxic individual constituents, based on either experimental data and/or predictions (*i.e.*, ECOSAR) and conservative assumptions in a screening-level assessment when mixture characterization is inadequate for higher tiered assessment (environmental hazard).

There were no experimentally derived hazard data for these New Chemical Substances (Tier 1). EPA estimated the human health hazard of these chemical substances based on its estimated physical/chemical properties, by comparing it to compositionally analogous mixtures (Tier 2) for which there are information on human health hazard, using available human hazard information on representative constituents (Tier 3) of these New Chemical Substances, and other structural information.

Absorption of these New Chemical Substances through the skin, gastrointestinal tract, and lungs was estimated based on physical/chemical properties (form, molecular weight, water solubility, log P partition coefficient, and vapor pressure).

For these New Chemical Substances, EPA identified skin and eye irritation; acute toxicity; systemic toxicity (neurotoxicity, body weight effects, and liver, kidney, blood, spleen, and other organ effects); reproductive and developmental toxicity; oral and inhalation portal of entry effects; genetic toxicity; and carcinogenicity as hazards of these New Chemical Substances based on Tier 2 analogous mixtures and Tier 3 constituents of these New Chemical Substances. EPA identified hydrocarbon pneumonia/ aspiration hazard based

on the chemical composition (petroleum). EPA assumes that respiratory tract irritation is possible when exposed to these New Chemical Substances.

## II. Environmental Effects

Environmental fate is the determination of which environmental compartment(s) a chemical moves to, the expected residence time in the environmental compartment(s), and the known or expected removal and degradation processes. Environmental fate is an important factor in determining exposure and risk. U.S. EPA has a Persistent, Bioaccumulative and Toxicity (PBT) policy established in 1999 that uses a simple scoring system for persistence, bioaccumulation and toxicity. Persistence is important because chemicals that are not degraded in the environment will persist and may buildup in the environment, and thus increase potential for exposure. Persistence scores are, going from low to high persistence, identified as P1, P2, or P3. Bioaccumulation is important because substances that bioaccumulate in aquatic and/or terrestrial species pose the potential for elevated exposures to humans and other organisms via the food chain. Bioaccumulation scores are, going from low to high bioaccumulation, identified as B1, B2, or B3. The toxicity score (T) is usually only used when the P and B scores are both a value of 2 or 3; in which case the chronic toxicity (to environmental organisms or human health) is assigned a value as described in the 1999 policy.

The environmental fate assessment utilized a similar tiered approach as the environmental hazard and human health teams to evaluate environmental persistence and bioaccumulation potential. However, a conservative-based weight of evidence approach was also utilized for persistence.

EPA acknowledges that biodegradation is not the only fate endpoint used to evaluate persistence. Likewise, experimentally-derived data were not always available (Tiers 1, 2 and 3) on all of the fate endpoints, and, as a result, Tier 4 data (predicted data for the constituents) were also used to evaluate environmental fate. The added weight of evidence approach was also utilized to ensure that the experimentally-derived constituent biodegradation data (Tier 3) were weighted higher than the experimentally-derived data on a sufficiently similar fuel mixture (Tier 2) if one or more of the individual

constituents (Tier 3) did not show ready biodegradation. In other words, if the experimentally-derived constituent data (Tier 3) were more conservative than the experimentally-derived data on a sufficiently similar fuel mixture (Tier 2), those constituent data were weighted higher than Tier 2 data. Additionally, EPA relied on experimental and predicted bioaccumulation and bioconcentration data on the dominant constituents (Tiers 3 and 4) in the assessment of bioaccumulation potential because Tiers 1 and 2 contained no data to assess bioaccumulation potential.

EPA estimated that these New Chemical Substances could have limited persistence or be very persistent ("P1-P3") based on the aerobic and anaerobic biodegradation half-lives of the constituents (Tiers 3 and 4). EPA estimated that these New Chemical Substances could have limited persistence ("P1") or limited persistence to being very persistent ("P1-P3") and low potential for bioaccumulation ("B1"), low to moderate potential for bioaccumulation ("B1-B2"), or low to high potential for bioaccumulation ("B1-B3") depending on the data for the constituents. P-21-0162 and P-21-0163 received a P1 and B1, and P-21-0146, P-21-0160, and P-21-0161 received a P1-P3 and B1. P-21-0147, P-21-0148 and P-21-0150 received a P1-P3 and B1-B2. The remaining cases received a P1-P3 and B1-B3. Overall, these New Chemical Substances have the potential to bioaccumulate and be persistent in the environment, such that repeated exposures may cause food-chain effects via accumulation in exposed organisms.

#### F. Environmental Effects Summary

Environmental hazard is relevant to whether a new chemical substance is likely to present unreasonable risk because the significance of the risk is dependent upon both the hazard (or toxicity) of the chemical substance and the extent of exposure to the substance. EPA estimated environmental hazard of these New Chemical Substances (NCS) using a four-tier approach that incorporated whole fuel-stream and hydrocarbon constituent data. Nine of the NCSs, P-21-0145, P-21-0146, P-21-0147, P-21-0148, P-21-0149, P-21-0150, P-21-0155, P-21-0156, and P-21-0158, were evaluated using acceptable hazard data from four analogous fuel streams (Tier 2). The other nine used individual constituent hazard information and

combined them using the toxic unit approach, which predicts ecotoxicity endpoints for a mixture by combining the toxic contributions from each constituent. The lowest acute and chronic toxicity endpoints for each NCS were used to determine the environmental hazard and calculate the acute and chronic COCs. The lowest estimated acute toxicity endpoints for each NCS were all between 0.005 and 16.76 ppm, while chronic toxicity endpoints were all between 0.0003 and 1.77 ppm. As per established EPA/OPPT methods, the application of assessment factors of 4 (algae) or 5 (fish and aquatic invertebrates) to the acute toxicity values results in acute COCs between 0.002 ppm (2 ppb) and 3.352 ppm (3352 ppb). As per established EPA/OPPT methods, application of an assessment factor of 10 to chronic toxicity values (*i.e.*, ChV) results in chronic COCs between 0.00003 ppm (0.03 ppb) and 0.177 ppm (177 ppb). Seven NCSs (P-21-0147, P-21-0148, P-21-0150, P-21-0160, P-21-0161, P-21-0162, and P-21-0163) were classified as a moderate environmental hazard. Eleven NCSs (P-21-0144, P-21-0145, P-21-0146, P-21-0149, P-21-0152, P-21-0153, P-21-0154, P-21-0155, P-21-0156, P-21-0157, and P-21-0158) were classified as a high environmental hazard.

### III. Exposure and Risk Summary

EPA estimates occupational exposure and environmental release under the intended conditions of use described in these PMNs using ChemSTEER (Chemical Screening Tool for Exposures and Environmental Releases; <https://www.epa.gov/tsca-screening-tools/chemsteer-chemical-screening-tool-exposures-and-environmental-releases>). EPA uses EFAST (the Exposure and Fate Assessment Screening Tool; <https://www.epa.gov/tsca-screening-tools/e-fast-exposure-and-fate-assessment-screening-tool-version-2014>) to estimate general population, consumer, and environmental exposures.

#### Risks to Workers

Human health risks for systemic effects were identified for worker inhalation exposures to P-21-0144, P-21-0146, P-21-0148, P-21-0152, P-21-0154, P-21-0155, P-21-0156, and P-21-

0157. Risks were identified workers for systemic effects via dermal contact to P-21-0152, P-21-0153, P-21-0154, P-21-0155, and P-21-0156. For workers, cancer risk estimates from inhalation exposure ranged between  $5.1\text{E-}08$  and  $7.1\text{E-}03$ . Hazards for irritation to the respiratory tract (all cases), skin (all cases except P-21-0152, P-21-0162, and P-21-0163), and eye (all except P-21-0154) via inhalation and dermal contact were also identified for workers. Risks for these endpoints were not quantified due to a lack of dose-response for these hazards.

### **Risk to General Population**

For P-21-0144, 0148, 0149, 0150, 0152, and 0157, risks were identified for the general population (infants) for systemic and/or oral portal-of-entry effects via drinking water. Risks to adults for this exposure route were identified for P-21-0152. For P-21-0145, 0146, 0147, 0155, 0156, and 0158, risks were not identified for the general population for systemic and/or oral portal-of-entry effects via drinking water (adults or infants). For P-21-0153, 0154, 0160, 0161, 0162, and 0163, risks to the general population via drinking water were not evaluated because releases to surface water are not expected.

For P-21-0144, 0148, 0149, 0150, 0152, 0155, 0156, 0157, and 0158, risks were identified for the general population for systemic and/or oral portal-of-entry effects via fish ingestion.

For P-21-0146 and 0147, risks were not identified for the general population for systemic and/or oral portal-of-entry effects via fish ingestion. For P-21-0153, 0154, 0160, 0161, 0162, and 0163, risks to the general population via fish ingestion were not evaluated because releases to surface water are not expected.

For P-21-0144, 0145, 0146, 0147, 0148, 0149, 0150, 0156, 0157, and 0158, risks were not identified for the general population for systemic and/or oral portal-of-entry effects via intake of groundwater impacted by landfill leachate. For P-21-0152, 0153, 0154, 0155, 0160, 0161, 0162, and 0163, risks to the general population via groundwater impacted by landfill leachate were not evaluated because releases to landfill were expected to be negligible (below modeling thresholds) or no releases are expected.

For P-21-0148, 0152, 0154, 0155, 0156, 0157 and 0158, risks were identified for the general population for systemic and/or inhalation portal-of-entry effects via fugitive air inhalation. For P-21-0144, 0145, 0146, 0147, 0149, 0150, 0160, 0161, 0162, and 0163, risks were not identified for the general population for systemic and/or inhalation portal-of-entry effects via fugitive air inhalation. For P-21-0153, there is insufficient information to assess hazard because of a lack of suitable Tier 2 mixtures or representative constituents with inhalation PODs. Therefore, EPA cannot make a risk determination for the general population exposed via fugitive air inhalation.

For P-21-0149, 0152, 0155, 0156, 0157 and 0158, risks were identified for the general population for systemic and/or inhalation portal-of-entry effects via stack air inhalation. For the remaining cases, risks to the general population via stack air inhalation were not evaluated because no releases are expected.

For the general population, cancer risk estimates for drinking water ranged between  $1.3 \times 10^{-10}$  (P-21-0146) and  $1.7 \times 10^{-8}$  (P-21-0148). The cancer risk estimates for fish ingestion ranged between  $7.8 \times 10^{-10}$  (P-21-0146) and  $3.3 \times 10^{-5}$  (P-21-0158). The cancer risk estimates for consumption of groundwater impacted by landfill ranged between  $2.7 \times 10^{-9}$  (P-21-0144) and  $1.8 \times 10^{-7}$  (P-21-0148). The cancer risk estimates for inhalation of fugitive air ranged between  $8.3 \times 10^{-8}$  (P-21-0144) and  $1.2 \times 10^{-4}$  (P-21-0150). The cancer risk estimate for inhalation of stack air for P-21-0158 was  $2.5 \times 10^{-1}$ .

### **Risk to Consumers**

Consumer uses were identified for P-21-0144, 0145, 0146, 0147, 0148, 0149, 0150, 0155, 0156, 0157, and 0158. Consumer uses were not identified for the remaining cases. Non-cancer risks to consumers via dermal contact were identified for P-21-0155 and not identified for any of the remaining cases. Hazards for respiratory, dermal, and eye irritation via dermal contact were identified for consumers. Risks for these endpoints were not quantified due to a lack of dose-response for these hazards.

### **Environmental Risks**

There were no environmental risks to aquatic organisms from the manufacturing of the 18 NCSs as there were no expected releases to water. Environmental risks to aquatic organisms from acute exposures during processing were identified for P-21-0144, 0145, 0146, 0147, 0149, and 0150 because the estimated surface water concentrations exceeded the acute concentrations of concern. Environmental risks to aquatic organisms from acute exposures during use were identified for P-21-0155, 0156, 0157, and 0158 because the estimated surface water concentrations exceeded the acute concentrations of concern. Environmental risks to aquatic organisms from acute exposures during both processing and use were identified for P-21-0148 and 0152 because the estimated surface water concentrations exceeded the acute concentrations of concern. Environmental risks to aquatic organisms from acute exposures were not identified for P-21-0153, 0154, 0160, 0161, 0162, or 0163 as there were no expected releases to water. Environmental risks to aquatic organisms from chronic exposure were not identified.

## Appendix 3: Termination of Certain Obligations through Significant New Use Rule (SNUR) and SNUR Notification Requirements

### I. Termination of Certain Obligations Through a SNUR

The requirement in Section I.B.1 in this Order (Limit on Manufacture by Others) and Section III.B, C, and D (Terms of Distribution) and Section IV (Temporary Storage and Transport) expire 75 days after publication of a final SNUR corresponding to this Order under Sections 15 U.S.C. §§ 2604(a)(2) and 2604(f)(4) of TSCA, unless the Company is notified by EPA of an action in a Federal Court seeking judicial review of the SNUR. In that case, the Prohibition will remain in effect until EPA notifies the Company that all Federal Court Actions have been resolved and the validity of the SNUR has been affirmed.

### II. Final SNUR Required Notification

- A. Whenever the Company causes, encourages or suggests the manufacture, processing, use or distribution of the New Chemical Substance by a person, the Company must notify each recipient once, in writing, of the existence of the final SNUR.
- B. The required notification must reference the publication of the SNUR in the Federal Register or Code of Federal Regulations; and must specify all significant new uses under the SNUR that would require significant new use notice to EPA.
- C. Records documenting the written notification must be maintained for 5 years from the date of their creation.

## Appendix 4: Protection in the Workplace

The Company is prohibited from manufacturing, processing or using the New Chemical Substance without establishing the following: Engineering and Administrative Controls

The Company must implement engineering control measures (e.g., enclosure or confinement of the operation(s), general and local ventilation) or administrative control measures (e.g., workplace policies and procedures), where feasible, to prevent exposure to these New Chemical Substances in the work area.

### Dermal Personal Protective Equipment

- A. The Company must ensure that each employee reasonably likely to be dermally exposed in the work area through direct handling or contact with equipment or surfaces containing or contaminated with these New Chemical Substances are provided with, and is required to wear, personal protective equipment ("PPE") that provides a barrier to prevent dermal exposure to the NCS in the specific work area where it is selected for use.
- B. PPE must be selected and used in accordance with the Occupational Safety and Health Administration (OSHA)'s requirements at 29 C.F.R. §§ 1910.132, 1910.133, and 1910.138.
- C. Gloves must be replaced at the end of each work shift during which they are exposed to the New Chemical Substance. If permeation testing was used to establish impermeability, gloves may not be used for longer than for which they were tested.
- D. Demonstration of Imperviousness

The Company must demonstrate that the PPE selected provides an impervious barrier to prevent dermal exposure during expected duration and conditions of exposure. The Company may make this demonstration by any one or a combination of the following:

## Appendix 5: Recordkeeping

The Company shall maintain the following records for 5 years after the date they are created (or longer if required in this Order) and must produce them for inspection, copying or as otherwise required under Section 11 of TSCA, 15 U.S.C. § 2610:

### I. Manufacturing Volume

Records documenting the manufacturing volume (including import) of these New Chemical Substances and the corresponding dates of manufacture (import).

### II. Sites of Manufacture

Records documenting the address of all sites of manufacture, import, processing and use.

### III. Sales and Transfers

Records documenting the date of all sales or transfers, the quantity of these New Chemical Substances sold or transferred, and the names and addresses (including shipping address, if different) outside the site of manufacture to whom the Company directly sells or transfers these New Chemical Substances.

### IV. Protection in the Workplace

#### A. Protection in the Workplace Requirements

Records documenting establishment and implementation of a program pursuant to the requirements in Protection in the Workplace Section and Appendix. Records used to demonstrate compliance under 29 C.F.R. § 1910.1200(e) may be used to satisfy this record keeping obligation if such records fulfill the requirements in Protection in the Workplace Section and Appendix.

#### B. Demonstration of Imperviousness

Records documenting the determinations that chemical protective clothing is impervious to these New Chemical Substances.

V. Compliance with this Order

A. Terms of Manufacturing, Processing, Use, Distribution and Disposal

Records documenting compliance with the applicable manufacturing, processing, use, distribution and disposal requirements in this Order.

VI. Exemption Records

Records documenting compliance to the requirements of any exemption specifically included in this Order.

A. Research & Development Exemption

For any amounts or batches of these New Chemical Substances eligible for the Research and Development Exemption, the Company must maintain, for 5 years from the date of their creation, the records required by 40 C.F.R. § 720.78(b).

## Appendix 6: Successor Liability Upon Transfer of Order

The Company may transfer its interest in these New Chemical Substances, after the New Chemical Substances have been placed on the TSCA Inventory. The terms of this Order apply to a Successor in Interest, pursuant to the following requirements:

The Notice of Transfer of Toxic Substances Control Act Section 5(e) Order (Notice of Transfer) must be fully executed before the Successor in Interest manufactures these New Chemical Substances.

The Notice of Transfer shall clearly state the effective date of the transfer of interest in these New Chemical Substances and must contain provisions which expressly transfer liability for these New Chemical Substances under the terms of this Order from the Company to the Successor in Interest.

Copies of the Notice of Transfer must be maintained by the Successor in Interest at its principal place of business, and at all sites where these New Chemical Substances are manufactured.

The Notice of Transfer when fully executed shall be incorporated as, and become an enforceable part, of this Order.

The Successor in Interest is liable for compliance with the requirements and obligations of the Order as of the date of the transfer of interest in these New Chemical Substances.

The Notice of Transfer shall be submitted as a support document for these PMNs, using the procedures set out in 40 C.F.R. § 720.40, within 10 days of the effective date of the transfer.

Any new confidentiality claims asserted in the Notice of Transfer must be substantiated at the time of the submission in accordance with TSCA Section 14(c)(3), 15 U.S.C. § 2613(c)(3).

Guidance on substantiating CBI claims may be found at <https://www.epa.gov/tsca-cbi/substantiating-cbi-claims-under-tsca-time-initial-submission>. A Notice of Transfer cannot modify a CBI claim made by the PMN Submitter to assert a claim of confidentiality for information which has been released to the public by EPA because (1) PMN Submitter did not

assert a CBI claim for that information, or (2) notwithstanding such a claim, EPA disclosed the information to the public in accordance with its authority under TSCA or applicable regulations.

NOTICE OF TRANSFER OF TOXIC SUBSTANCES CONTROL ACT  
SECTION 5(e) ORDER

Transferor:

Name of New Chemical Substance:

PMN Number:

1. Transfer of Interest in New Chemical Substance Pursuant to Terms of the Order. Effective on \_\_\_\_\_, the Company did sell or otherwise transfer to \_\_\_\_\_, ("Successor in Interest") its interests in the above-referenced New Chemical Substance, which was the subject of a premanufacture notice ("PMN") and the manufacture of which is governed by an Order issued by the U.S. Environmental Protection Agency ("EPA") under the authority of Section 5(e) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §2604(e).

2. Assumption of Liability. The Successor in Interest hereby certifies that, as of the effective date of transfer, it has assumed all obligations conferred under the Order. The Successor in Interest also certifies that it is incorporated, licensed, or doing business in the United States in accordance with 40 C.F.R. § 720.22(a)(3).

3. Confidential Business Information. The Successor in Interest hereby (check one):

- ☐ Reasserts  
☐ Relinquishes  
☐ Modifies

all Confidential Business Information ("CBI") claims made by the Company, pursuant to Section 14 of TSCA, 15 U.S.C. § 2613, and 40 C.F.R. part 2, for the New Chemical Substance(s). Where "reasserts" or "relinquishes" is indicated, that designation will be deemed to apply to all such claims. Where "modifies" is indicated, such modification will be explained in detail in an attachment to this Notice of Transfer.

I certify that it is true and accurate that the Successor in Interest has:

- (a) Taken reasonable measures to protect the confidentiality of the information;

- (b) Determined that the information is not required to be disclosed or otherwise made available to the public under any other Federal law;
- (c) A reasonable basis to conclude that the disclosure of the information is likely to cause substantial harm to the competitive position of the Successor in Interest; and
- (d) A reasonable basis to believe that the information is not readily discoverable through reverse engineering.

CBI claims for chemical identity must be accompanied by a generic chemical identity, which may be that used for the PMN.

_____ Company (Transferor)	_____ PMN Number
_____ Signature of Authorized Official	_____ Date
_____ Printed name of Authorized Official	
_____ Title of Authorized Official	
_____ Successor in Interest	_____ Date
_____ Signature of Authorized Official	_____ Successor's Technical Contact
_____ Printed Name of Authorized Official	_____ Phone
_____ Title of Authorized Official	_____ Address
_____ Address	_____ City, State, Zip Code
_____ City, State, Zip Code	_____

## Attachment A

### Federal Regulations Potentially Applicable to Fuel Stored, Transported, Dispensed and Used Within the United States

This list is not intended to be an exhaustive list of environmental, health and safety regulations. There may be other federal, state, and/or local regulations that apply to fuel quality, transportation, handling, dispensing and storage. EPA expects that companies are complying with these and other applicable regulations.

Agency	Rule Name	Purpose	Regulatory Citation	Applicability
EPA	Regulation of Fuels, Fuel Additives, and Regulated Blendstocks	Standards for fuel parameters that directly or indirectly affect vehicle, engine, and equipment emissions, air quality, and public health. Standards and requirements for fuel additives and regulated blendstocks. Requirements for demonstrating compliance.	40 CFR Part 1090	Refiners and importers  <i>See 40 CFR 1090.1 through 1090.1850.</i>
EPA	Fuel Registration Requirements	Requires registration of fuels and fuel additives	40 CFR Part 79	Manufacturers of fuel and fuel additives  <i>See 40 CFR 79.1, &amp; 79.4(a) and (b).</i>

EPA	NSPS for tanks	Requires controls on storage tanks that store higher vapor pressure petroleum products such as gasoline	40 CFR Part 60, Subpart K, Ka, & Kb	Applies to each storage vessel for petroleum liquids in excess of 40,000 gallons. Specific applicability of K or Ka or Kb is determined by date of tank construction, modification, or reconstruction.  <i>See 40 CFR 60.110, 60.110a, and 60.110b.</i>
EPA	Standard for Bulk Gasoline Terminals	Requires controls for loading racks used to deliver gasoline into tank trucks	40 CFR Part 60, Subpart XX	The affected facility to which the provisions of this subpart apply is the total of all the loading racks at a bulk gasoline terminal which deliver liquid product into gasoline tank trucks, the construction or modification of which commenced after 12-17-80.  <i>See 40 CFR 60.500(a).</i>
EPA	MACT for large Gasoline Distribution Facilities (Bulk Gasoline Terminals and Pipeline Breakout Stations)	Establishes requirements for Gasoline Distribution Bulk Terminals, Bulk Plants, and pipeline facilities	40 CFR Part 63, Subpart R	The affected sources to which the provisions of this subpart apply are each bulk gasoline terminal and each pipeline breakout station, except those otherwise excluded or exempted as specified in § 63.420.  <i>See 40 CFR 63.420.</i>
EPA	Smaller bulk gasoline terminals	Establishes requirements for smaller Gasoline Distribution Bulk Terminals, Bulk Plants, and pipeline facilities	40 CFR Part 63, Subpart BBBBBB	The affected sources to which this subpart applies are each area source bulk gasoline terminal (not subject to 40 CFR Part 63, Subpart R), each pipeline breakout station (not subject to 40 CFR Part 63, Subpart R), pipeline pumping station, and bulk gasoline plant identified in paragraphs (a)(1) through (4) of this section.

				<i>See 40 CFR 63.11081.</i>
EPA	Gasoline Dispensing Facilities	Establishes requirements for gasoline dispensing facilities (GDF) to limit air emissions	40 CFR Part 63, Subpart CCCCCC	Each GDF that is located at an area source. The affected source includes each gasoline cargo tank during the delivery of product to a GDF and also includes each storage tank.  <i>See 40 CFR 63.11110 and 11111(a).</i>
OSHA	Fuel handling at marine terminals	Protect workers handling fuels at marine terminals	29 CFR § 1917.156	Handling of fuels at a marine terminal
OSHA	Hazard Communication Standard	Informing employees of risks of the chemicals with which they work	29 CFR § 1910.1200	Manufacturers, employers and distributors
OSHA	Permissible Exposure Limits	Limit inhalation occupational exposures	29 CFR § 1910.1000 (Z tables) or 29 CFR 1910.1028 for benzene	Employers subject to OSHA standards  <i>See 29 CFR 1910.5(a).</i>
OSHA	Flammable Liquids	Provides worker protections for workers handling specific quantities of flammable liquids	29 CFR § 1910.106	Employers subject to OSHA standards  <i>See 29 CFR 1910.5(a).</i>
OSHA	Process Safety Management Standards	Provides worker protections for workers handling specific quantities of highly hazardous substances	29 CFR § 1910.119	Applicability depends upon whether gasoline is being stored purely for the purpose of delivery to consumers and if not, on what types of tanks are used to store the gasoline. General criteria: Employers who operate a process

				<p>(including storage) which involves a chemical at or above the specified threshold quantities listed in appendix A to this section; and, a process which involves a Category 1 flammable gas (as defined in 1910.1200(c)) or a flammable liquid with a flashpoint below 100 °F (37.8 °C) on site in one location, in a quantity of 10,000 pounds (4535.9 kg) or more.</p> <p>Gasoline stored for consumer use is not covered.</p> <p><i>See 29 CFR 1910.5(a) and See 29 CFR 1910.119.</i></p>
EPA	Risk Management Program	Provides community protections for workers handling specific quantities of highly hazardous substances – includes gasoline	40 CFR Part 68, Subpart G	<p>An owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process; however, gasoline intended for consumer use is exempt.</p> <p><i>See 40 CFR 68.10.</i></p>
DOT Hazard Materials Regulations	Hazard Materials Transportation	Provides standards for labeling, storing and transporting hazardous materials, including gasoline	49 CFR Parts 100-180	<p>The hazardous materials regulations are applicable to the transportation of hazardous materials in commerce and their offering to:</p> <ol style="list-style-type: none"> <li>1. Interstate, intrastate, and foreign carriers by rail car, aircraft, motor vehicle and vessel.</li> <li>2. The representation that a hazardous material is present in a package, container, rail car, aircraft, motor vehicle or vessel.</li> <li>3. The manufacture, fabrication, marking, maintenance, reconditioning, repairing or testing of a package or container which is represented, marked, certified or sold for use in</li> </ol>

				the transportation of hazardous materials.  <i>See 49 CFR 171.1(a).</i>
Coast Guard	Marine Occupational Safety and Health Standards	Provides standard for ships and barges carrying benzene or benzene containing liquids in bulk	46 CFR Part 197, Subpart C	This subpart applies to all Coast Guard inspected vessels, including tank ships and barges, that are carrying benzene or benzene containing liquids in bulk as cargo. This subpart does not apply to vessels that are carrying only liquid cargoes containing less than 0.5% benzene by volume.  NOTE: Most gasoline contains < 5% benzene.  <i>See 46 CFR 197.501.</i>



Message

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**From:** Kemker, Carol [Kemker.Carol@epa.gov]  
**Sent:** 4/7/2023 2:28:58 PM  
**To:** Zapata, Cesar [Zapata.Cesar@epa.gov]; Pinkney, James [Pinkney.James@epa.gov]; Ward, Nacosta [Ward.Nacosta@epa.gov]; Lamberth, Larry [Lamberth.Larry@epa.gov]; Newman, Keriema [Newman.Keriema@epa.gov]; Freeman, Caroline [Freeman.Caroline@epa.gov]; Toney, Anthony [Toney.Anthony@epa.gov]; Hansen, Susan [Hansen.Susan@epa.gov]  
**CC:** Wise, Allison [Wise.Allison@epa.gov]  
**Subject:** RE: WLOX: Media Request

Adding Susan Hansen since this sounds like EPA has been sued.

---

**From:** Zapata, Cesar <Zapata.Cesar@epa.gov>  
**Sent:** Friday, April 7, 2023 10:28 AM  
**To:** Kemker, Carol <Kemker.Carol@epa.gov>; Pinkney, James <Pinkney.James@epa.gov>; Ward, Nacosta <Ward.Nacosta@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Toney, Anthony <Toney.Anthony@epa.gov>  
**Cc:** Wise, Allison <Wise.Allison@epa.gov>  
**Subject:** RE: WLOX: Media Request

Including ARD as this is related to the pyrolysis process.

**César A. Zapata**, Director  
Land, Chemicals and Redevelopment Division  
United States Environmental Protection Agency, Region 4

***Our Vision:** Protecting human health and the environment through responsible waste management, effective chemical safety, and collaborative redevelopment of contaminated land.*

***Our Guiding Values:** Customer Service, Innovation, Integrity, National Leadership, Ownership, and Partnerships.*

---

**From:** Kemker, Carol <Kemker.Carol@epa.gov>  
**Sent:** Friday, April 7, 2023 10:23 AM  
**To:** Pinkney, James <Pinkney.James@epa.gov>; Ward, Nacosta <Ward.Nacosta@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>  
**Cc:** Wise, Allison <Wise.Allison@epa.gov>; Zapata, Cesar <Zapata.Cesar@epa.gov>  
**Subject:** RE: WLOX: Media Request

I am looking into this and will get back to you. It sounds like it could be a permitting issue. Give me a bit to figure it out. I'm copying Cesar to see if he knows.

---

**From:** Pinkney, James <Pinkney.James@epa.gov>  
**Sent:** Friday, April 7, 2023 10:11 AM  
**To:** Ward, Nacosta <Ward.Nacosta@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>  
**Cc:** Kemker, Carol <Kemker.Carol@epa.gov>; Wise, Allison <Wise.Allison@epa.gov>  
**Subject:** FW: WLOX: Media Request

Nacosta,

We received the following request for an interview this morning. Who should I work with in ECAD?

James

---

**From:** Wise, Allison <[Wise.Allison@epa.gov](mailto:Wise.Allison@epa.gov)>  
**Sent:** Friday, April 7, 2023 9:00 AM  
**To:** EPA Press Office <[Press@epa.gov](mailto:Press@epa.gov)>; Jenkins, Brandi <[Jenkins.Brandi@epa.gov](mailto:Jenkins.Brandi@epa.gov)>; Milbourn, Cathy <[Milbourn.Cathy@epa.gov](mailto:Milbourn.Cathy@epa.gov)>; Pinkney, James <[Pinkney.James@epa.gov](mailto:Pinkney.James@epa.gov)>  
**Subject:** RE: WLOX: Media Request

Adding James

Allison

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**From:** Amber Spradley <[Amber.Spradley@wlox.com](mailto:Amber.Spradley@wlox.com)>  
**Sent:** Friday, April 7, 2023 8:03 AM  
**To:** EPA Press Office <[Press@epa.gov](mailto:Press@epa.gov)>; Jenkins, Brandi <[Jenkins.Brandi@epa.gov](mailto:Jenkins.Brandi@epa.gov)>; Wise, Allison <[Wise.Allison@epa.gov](mailto:Wise.Allison@epa.gov)>; Milbourn, Cathy <[Milbourn.Cathy@epa.gov](mailto:Milbourn.Cathy@epa.gov)>  
**Subject:** WLOX: Media Request

Hello there,

My name is Amber Spradley. I am a reporter with WLOX in South Mississippi.

I am covering a community group in Pascagoula suing EPA for allowing pyrolysis oil at Chevron, the "Cherokee Concerned Citizens".

I am forwarding a press release I received that is embargoed until 11ET/10CT AM.

Is someone from your team available to Zoom with me this morning or provide a statement in response to the filing and your thoughts on the concern over the health hazards involved, if any.

Thanks so much,

Amber Spradley  
228-806-7325

Begin forwarded message:

**From:** Zahra Ahmad <[zahmad@earthjustice.org](mailto:zahmad@earthjustice.org)>  
**Date:** April 6, 2023 at 5:07:07 PM CDT  
**To:** Amber Spradley <[Amber.Spradley@wlox.com](mailto:Amber.Spradley@wlox.com)>  
**Subject:** Embargoed until 11 a.m. EST April 7, 2023

**EMBARGOED UNTIL 11 A.M. EST April 7, 2023**

**For Immediate Release** | April 7, 2023  
Contact: Zahra Ahmad, [zahmad@earthjustice.org](mailto:zahmad@earthjustice.org), (517)898-0924

## Community Sues EPA for Allowing Production of Petrochemical Fuel Despite Extreme Cancer Risk

*EPA approved Chevron USA's request to make the fuel despite the up to 1 in 4 cancer risk it poses to a fenceline community in Pascagoula, Mississippi*

**Washington, D.C.**— A community group in Pascagoula, Mississippi, today filed a lawsuit against the Environmental Protection Agency for its approval of new chemicals to make fuels despite finding that the resulting air pollution would pose a cancer risk 250,000 times greater than what the agency typically considers unreasonable.

Cherokee Concerned Citizens is challenging EPA's decision to allow the world's largest Chevron refinery—located about a mile away from their neighborhood—to turn plastic waste into fuels. EPA determined that production of Chevron's new chemicals will pose up to a 1 in 4 cancer risk, meaning 25% of residents living nearby could develop cancer over their lifetime.

Under the Toxic Substances Control Act, EPA can't approve new chemicals with serious health or environmental risks without identifying and implementing ways to minimize the dangers. The agency can also order lab testing that would clarify such risks. EPA did not do either before approving Chevron's request to produce this hazardous fuel.

"EPA's decision to let Chevron poison the community in Pascagoula with chemicals posing astronomical cancer risks makes a mockery of the agency's stated commitments to environmental justice," said Earthjustice attorney Katherine O'Brien. "EPA needs to follow the law and protect people at the fenceline, not greenwash for Chevron by passing off the company's plastic-waste fuel as a solution to the climate crisis."

The Cherokee Concerned Citizens represent a fenceline community overburdened by pollution from several facilities including the Chevron refinery, which is visible from their neighborhood, a BP gas processing plant, the Mississippi Phosphates superfund site, and more. A total of 70 toxic chemical releases, from benzene to formaldehyde, have been reported to regulatory agencies by the facilities in Pascagoula.

"We can't tolerate it anymore," said **Barbara Weckesser, co-founder of Cherokee Concerned Citizens**. "It's always been profit over the people, but it must end now. The residents in our community are already at a higher risk of developing health problems because of all the industry polluting our neighborhood. The EPA's approval of Chevron's ask is forcing us to fight, leave, or stay here and die."

EPA approved Chevron's creation of fuel products from discarded plastics under a program that it says will help "confront the climate crisis" by promoting the development of new biofuels to replace petroleum-based fuels. But fuel made from plastic waste is not biofuel; it's part of the oil and gas industry's last-ditch effort to protect their profits by betting big on petrochemicals, which are converted components of oil and gas used to make plastic building blocks.

In the U.S., the industry is planning a massive build-out of petrochemical plants. Many of these facilities are planned in low-income communities and communities of color already overburdened by pollution and a long history of environmental racism. If the build-out goes forward, it will lock in more climate pollution, plastic waste, and toxic chemicals that poison communities.

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